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**Richfield Hospitality, Inc. as Managing Agent for
Kahler Hotels, LLC and UNITE HERE Interna-
tional Union Local 21.** Case 18–CA–176369

June 26, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND
EMANUEL

On May 4, 2017, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions with supporting argument, and the General Counsel filed an answering brief. The General Counsel also filed cross-exceptions with supporting argument, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge’s rulings,¹ findings,² and conclusions only to the extent consistent with this Decision and Order.³

In *Richfield I*, the Board found that the Respondent committed violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act while the parties were bargaining in 2015 for a successor collective-bargaining agreement covering employees in a bargaining unit spanning four Rochester, Minnesota area hotels managed by the Respondent. The instant case involves allegations that the Respondent committed additional violations of Section 8(a)(1) and (5) after the parties resumed bargaining in 2016.

For the reasons set forth below, we affirm the judge’s findings that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining since about February 2016 and by unilaterally implementing portions of its

March 24, 2015 bargaining proposal in May and July 2016. We reverse the judge’s finding that the Respondent violated Section 8(a)(1) of the Act by threatening employees that union representation was futile.

I. SURFACE BARGAINING AND UNILATERAL WAGE
CHANGE

A. *Relevant Facts*

The parties’ last bargaining session in 2015 took place on September 25.⁴ They resumed bargaining for a successor contract on February 25, 2016.⁵ At that time, several of the unfair labor practices found in *Richfield I* remained unremedied. Of particular relevance to the resumed negotiations, the Respondent adhered to its unlawful unilateral discontinuation of longevity wage increases for certain unit employees and continued to withhold relevant requested information regarding the Respondent’s costs for the Union’s health and welfare proposal for bargaining-unit employees. During the February 25 bargaining session, the Union submitted and explained a new proposal on some issues. The Respondent’s chief negotiator, Michael Henry, made no immediate response, indicating that he first needed to speak with management officials who were not present at the meeting.

On March 1, Henry informed the Union in an email⁶ that the parties were at impasse and that, accordingly, the Respondent intended to implement portions of its last, best, and final offer dated March 24, 2015 (“the 2015 final offer”). The Respondent subsequently retracted this declaration of impasse. On March 11, Union President Nancy Goldman requested that the Respondent provide dates for negotiations. Five days later, Henry sent an email to Goldman that again stated that the parties were at impasse. This time, Henry declared a “single-issue impasse” over the Respondent’s 2015 final offer because the Union continued to reject the Respondent’s wage proposal, with the exception of agreement to the proposed new start rates for

¹ We find that the judge correctly refused to apply collateral estoppel to the findings made by Administrative Law Judge Sharon L. Steckler in *Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC*, 368 NLRB No. 44 (2019) (*Richfield I*), because, at the time of the judge’s decision, Judge Steckler’s decision was not yet final. As explained below, however, we now rely on some of the findings of fact and legal conclusions in Judge Steckler’s decision given that the Board has subsequently affirmed it.

² The General Counsel has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf’d. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge’s dismissal of the complaint allegations that the Respondent, by its Area Managing

Director Bill Dwyer, threatened employees in violation of Sec. 8(a)(1) by questioning the effectiveness of the Union, stating that the Union was “not a real union,” and telling employees that they could face layoffs if they spoke about Judge Steckler’s decision.

³ We shall modify the judge’s remedy, Conclusions of Law, and recommended Order to conform to our findings, to the Board’s standard remedial language, and in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall also substitute a new notice to conform to the Order as modified.

⁴ As found in *Richfield I*, the parties had agreed to meet again for bargaining on October 20, but the Respondent unlawfully cancelled that session on October 19.

⁵ All dates are in 2016, unless otherwise noted.

⁶ Unless otherwise stated, all communications between the parties after February 25 were by email.

the first year.⁷ In spite of this impasse declaration, Henry's email noted that the Respondent was prepared to continue and complete discussions on the "handful" of nonwage proposals made by the Union on February 25. On March 25, the Respondent provided its responses to these proposals. They included tentative agreements with respect to some of the nonwage issues.

No further bargaining took place before May 5, when the Respondent yet again informed the Union that the parties were at a single-issue impasse over the wage provisions in the Respondent's 2015 final offer. On this occasion, however, the Respondent stated its intention to implement, on May 16, key wage provisions as well as some other proposals in the 2015 final offer, including proposals relating to temporary employees' hours and reassignment of employees to other hotels. Goldman replied on that same date, stating that the Union disagreed that the parties were at impasse and offering new dates to meet. The next day, the Respondent sent another email reiterating that the parties were at impasse and asking if the Union had any new proposals.

On May 10, Goldman sent an email to the Respondent offering to meet for negotiations in early June. On May 12, Bill Dwyer, who had replaced Henry as the Respondent's lead negotiator, replied that the parties were at a single-issue impasse related to wages and that the Respondent would not discuss its wage proposal further unless the Union offered a new wage proposal. However, Dwyer's letter reaffirmed the willingness expressed in Henry's March 16 email to meet, without any preconditions, for further discussion of the handful of issues raised by the Union's February 25 proposals.⁸

On May 16, the Respondent implemented parts of its 2015 final offer, but did not implement the proposals for employee reassignment and temporary employees. The parties nevertheless met for bargaining on June 7, and they reached additional tentative agreements on non-wage issues. Goldman also orally presented a new economic proposal, which she emailed to the Respondent after the meeting. The proposal included a restatement of the health and welfare proposal that the Union made on February 25.

On June 22, the Respondent's counsel sent Goldman a letter reviewing the parties' bargaining history, rejecting the Union's new wage proposal as untimely and insufficient, and rejecting the health and welfare proposal "based

on cost." The letter also stated that the proposals for employee reassignment and temporary employees had not been implemented on May 16 in anticipation of possible resolution in bargaining but now would be implemented on July 7 in light of the Union's bargaining positions on June 7. Those proposals were unilaterally implemented on that date.

B. Analysis

1. *Surface Bargaining.* For the following reasons, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in surface bargaining since about February 2016. Section 8(d) of the Act requires "the employer to meet at reasonable times with the representative of its employees and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Although the duty to bargain in good faith under Section 8(d) "does not compel either party to agree to a proposal or to make a concession," the Act is predicated on the notion that the parties must have a sincere desire to enter into "good faith negotiation with an intent to settle differences and arrive at an agreement." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), *enfd.* 308 F.3d 859 (8th Cir. 2002). "[M]ere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." *Id.*

In determining whether an employer has engaged in overall bad-faith bargaining, the Board examines the totality of the employer's conduct, both at and away from the bargaining table. *Id.* The Board then determines "whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001), *enfd.* 318 F.3d 1173 (10th Cir. 2003).

In finding that the Respondent engaged in unlawful surface bargaining during the period at issue, we rely on the following three factors.

(a) *The impact on 2016 negotiations of unremedied unfair labor practice violations found in Richfield I.* The Board has repeatedly held that a lawful impasse cannot be reached in the presence of a serious unremedied unfair

⁷ The General Counsel contends that the judge incorrectly found that the Respondent's wage proposal was comprised only of a spreadsheet when the parties resumed negotiations on February 25. We find merit in the General Counsel's exception, and find that the Respondent's wage proposal on February 25, which had not changed from its 2015 final offer, consisted of a wage spreadsheet and individual pie charts. The judge's erroneous factual finding on this point does not affect our analysis of whether the Respondent engaged in surface bargaining.

⁸ We agree with the judge's finding that the Respondent did not condition further bargaining on the Union's presentation of a new wage proposal. On the contrary, both Henry and Dwyer indicated a willingness to bargain on issues relating to the Union's February 25 proposals and suggested that there could be bargaining on wages if the Union made a new proposal.

labor practice that affects the negotiations.⁹ As stated above, the *Richfield I* decision affirmed the judge's findings that the Respondent violated Section 8(a)(5) during the parties' 2015 negotiations by unilaterally discontinuing longevity increases for certain unit employees and by failing to provide the Union with requested information regarding the Respondent's costs for the Union's health and welfare proposal for bargaining-unit employees. Both of these violations remained unremedied throughout the 2016 negotiations.

We find that these violations necessarily had serious adverse effects on bargaining in 2016. The unilateral change eliminating some employees' longevity increases directly impacted the wage bargaining that the Respondent has characterized as the central point of contention in the negotiations. This unlawful action "moved the baseline"¹⁰ as to this issue, making it more difficult for the parties to come to an agreement. Similarly, the Respondent's failure to provide requested cost information about the Union's health and welfare proposal fettered bargaining about an economic issue of great importance to the Union and limited its ability to make quid pro quo concessions. In fact, the June 22 letter from the Respondent's counsel rejected the Union's February 25 health and welfare proposal "again, based on cost," underscoring that the Respondent's unlawful refusal to provide this relevant requested cost information continued to negatively affect the Union's ability to bargain in 2016.

(b) *The Respondent's premature declarations of impasse.* Precisely because impasse temporarily suspends the duty to bargain, a premature declaration of impasse is often an indicium of bad-faith bargaining. *Grosvenor Resort*, 336 NLRB 613, 615 (2001), enfd. 52 Fed. Appx. 485 (11th Cir. 2002); *CJC Holdings, Inc.*, 320 NLRB 1041, 1044–1046 (1996), enfd. 110 F.3d 794 (5th Cir. 1997). That is what happened here. After a 5-month bargaining hiatus, the parties engaged in only a single face-to-face negotiating session, at which the Union made some new bargaining proposals. Without responding to those proposals, the Respondent's chief negotiator declared impasse on March 1. He later withdrew that declaration only to proclaim a single-issue impasse on March 16 while at the same time expressing a willingness to bargain over non-economic proposals made by the Union on February 25. On March 25, the Respondent addressed these proposals, agreeing to some of them.

Then, without any further bargaining sessions, the Respondent yet again declared single-issue impasse on May 5 and stated its intent to implement the wage parts of its 2015 final offer, even while reiterating a willingness to bargain over other issues and to discuss wages if the Union had a new proposal to make. In fact, on May 10, the Union requested to meet for that purpose on June 7. Although the Respondent proceeded, on May 16, to implement some of the provisions identified in its May 5 single-issue impasse declaration, it did not implement the provisions for employee reassignment and temporary employees, holding open the possibility of resolution through bargaining. Those provisions were implemented only after additional bargaining on June 7.

As described above, the record shows that the parties lacked a clear contemporaneous understanding that they were at impasse on any of the several occasions when the Respondent declared impasse. Both parties expressed the belief that additional bargaining might lead to agreement on non-economic and, perhaps, wage issues. See, e.g., *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 586 (1999) ("[F]or an impasse to occur, neither party must be willing to compromise."), enfd. 236 F.3d 187 (4th Cir. 2000). Indeed, on March 25, they reached agreement on some noneconomic issues. At the same time, the Respondent repeatedly sent the opposite signal with its impasse declarations. We find that the Respondent's repeated premature declarations of impasse belied a good-faith intention to engage in meaningful bargaining towards a final agreement.

(c) *The Respondent's failure to show that impasse over the single issue of wages created an overall impasse in bargaining on and after May 5.* With limited exceptions not applicable here, the Board requires that when parties are engaged in contract negotiations, an overall impasse in bargaining must exist before an employer may unilaterally implement some or all of the terms encompassed by its final offer. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). However, the Board has recognized that an overall impasse can occur based on a deadlock over a single issue. See, e.g., *CalMat Co.*, 331 NLRB 1084, 1097 (2000) ("A single issue . . . may be of such overriding importance that it justifies an overall finding of impasse on all of the bargaining issues.").

⁹ E.g., *Dynatron/Bondo Corp.*, 333 NLRB 750, 752 (2001), applying *Alwin Mfg. Co.*, 326 NLRB 646, 688 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999).

¹⁰ See *Alwin*, 192 F.3d at 139 (finding that, by changing the status quo, a unilateral change may move the baseline for negotiations and alter the parties' expectations about what they can achieve, making it harder for

the parties to come to an agreement); *Lafayette Grinding Corp.*, 337 NLRB 832, 833 (applying *Alwin* and finding that prior unilateral cessation of health and welfare payments impeded bargaining on key issue by pressuring union to seek restoration of status quo rather than pursue its demands for an increase in payments).

In order to prove overall impasse based on a single issue, the party asserting impasse must establish three things: (1) that a good-faith impasse existed as to a particular issue; (2) that the issue was critical; and (3) that the impasse on this critical issue “led to a breakdown in overall negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.” *Id.* (emphasis added); see also *Sacramento Union*, 291 NLRB 552, 554 (1988), *enfd.* sub nom. *Sierra Pub. Co. v. NLRB*, 888 F.2d 1394 (9th Cir. 1989).

The Respondent’s failure to prove the third factor is, standing alone, sufficient to preclude a finding that impasse over the single issue of wages had created a valid overall impasse as of any of the dates on which the Respondent declared a single-issue impasse. As previously stated, the Respondent’s response to the Union’s February 25 proposal included tentative agreements on non-wage issues. Moreover, the Respondent’s May 5 email expressed a willingness to meet again to discuss the Union’s February 25 noneconomic proposals and any new proposal the Union would make on wages. Five days later, the Union reiterated its desire to meet on June 7 for further bargaining. Furthermore, notwithstanding the Respondent’s partial implementation of new wage terms on May 16, the parties met on June 7 and, in fact, reached some tentative agreements on nonwage issues. The Union also orally presented a new wage proposal, a step the Respondent had repeatedly indicated could lead to renewed bargaining over wages.

Because progress in negotiations was still possible on non-wage and wage issues when the Respondent partially implemented certain parts of its 2015 final offer on May 16, and because the parties subsequently bargained about non-wage matters on and after June 7, we find that the Respondent did not establish the existence of a single-issue impasse. See *Prime Healthcare Centinela, LLC d/b/a Centinela Hospital Medical Center*, 363 NLRB No. 44, slip op. at 3 (2015) (finding that even if the evidence showed an impasse over healthcare, the employer failed to show that this deadlock caused a breakdown in overall bargaining).

Based on the foregoing, we affirm the judge’s finding that the Respondent engaged in surface bargaining in violation of Section 8(a)(5) and (1) of the Act.¹¹

2. *Unilateral Changes on May 16 and July 7, 2016.* Inasmuch as we find that the Respondent engaged in

unlawful surface bargaining and that the parties were not at good-faith impasse on the dates when the Respondent implemented parts of its 2015 final offer, we affirm the judge’s findings that those unilateral changes violated Section 8(a)(5) and (1) of the Act. Further, even in the absence of a separate surface bargaining violation, we would find that the unilateral changes violated Section 8(a)(5) and (1) based on the Respondent’s prior unremedied unilateral changes in 2015 and its failure to prove that the parties’ overall negotiations were at single-issue impasse.¹²

II. ALLEGED THREAT

A. Relevant Facts

During negotiations on June 7, the Respondent’s negotiator, Bill Dwyer, told bargaining unit employees that he could not believe that they had selected “these union negotiators,” noting that the negotiators “can’t get you anything and you should just leave the room.” The judge recognized that Dwyer’s words “in a vacuum” did not rise to the level of the alleged threat. However, based on the totality of circumstances including past unremedied unfair labor practices, he found the remarks to constitute a threat that the Respondent would not fulfill its statutory duty to bargain. In so finding, the judge considered that Dwyer was a high-level manager designated to represent the Respondent at the bargaining table and that no management official disavowed his remarks. The judge further noted that the Respondent’s past unfair labor practices had not been remedied.

We disagree with the judge and find that Dwyer’s comments were a lawful expression of personal opinion under Section 8(c) of the Act, which provides that the “expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . , if such expression contains no threat of reprisal or force or promise of benefit.” It is well settled that “an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees.” *Children’s Center for Behavioral Development*, 347 NLRB 35, 35 (2006); see also *Trailmobile Trailer, LLC*, 343 NLRB 95, 95 (2004) (finding that “flip and intemperate” remarks intended to make fun of union representatives did not violate the Act) (internal citation omitted).

¹¹ We emphasize that our finding is not based on the Respondent’s adherence to the wage proposals in its 2015 final offer. It is well established that “adamant” insistence on a negotiating position “is not of itself a refusal to bargain in good faith.” *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). We also disavow any reliance on the judge’s

extended remarks about “the modus operandi of the surface bargainer” or his consideration of the negotiating expertise of the Respondent’s legal representatives in this proceeding.

¹² We also do not rely on the May 16 and July 7 unilateral changes as indicia of the Respondent’s unlawful surface bargaining.

Here, we find that Dwyer's remarks during a negotiation session conveyed nothing more than his emotionally charged expression of a negative opinion of the Union's actions. It is clear that his statements did not contain any threat of reprisal or force or any promise of benefit; neither did they otherwise interfere with employees' Section 7 rights. As explained above, expressions of personal opinion such as Dwyer's are both constitutionally—and statutorily—protected speech. See *Erickson Trucking Service, Inc. d/b/a Erickson's Inc.*, 366 NLRB No. 171, slip op. at 2 (2018) (employer did not violate Section 8(a)(1) by disparaging the union when it referred to the union's business representative in pejorative terms). Further, we disagree with the judge that the Respondent's failure to remedy its past unfair labor practices converted Dwyer's remarks into an unlawful threat. Even assuming that otherwise lawful disparagement of a union may be rendered unlawful by contemporaneous coercive statements, see, e.g., *Fred Meyer Stores*, 362 NLRB 698, 700 (2015), no facts of that nature are presented here. Therefore, Dwyer's remarks were protected by Section 8(c) of the Act.

Accordingly, we reverse the judge and dismiss this allegation.

AMENDED CONCLUSIONS OF LAW

1. Delete the judge's Conclusion of Law 5 and renumber the remaining paragraphs accordingly.

2. Substitute the following for the judge's Conclusion of Law 6, renumbered as Conclusion of Law 5:

"Respondent violated Section 8(a)(5) and (1) of the Act by the following conduct: (1) engaging in surface bargaining by endeavoring to create the impression of bargaining in good faith, while having a fixed intent not to reach agreement and while taking various actions to avoid reaching agreement; (2) unilaterally changing the terms and conditions of employment of its unit employees by implementing portions of its 2015 final offer on May 16 and July 7, 2016, without the parties having reached a lawful impasse."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith, we shall order the Respondent to meet, on request, with the Union and bargain in good faith concerning the terms and conditions of employment of the bargaining unit employees

and, if agreement is reached, embody such agreement in a signed contract. In addition, having found that the Respondent unlawfully implemented portions of its 2015 final offer on May 16 and July 7, 2016, in the absence of a valid single-issue impasse, we shall direct the Respondent to reinstitute the terms and conditions of employment that existed before its unlawful changes. We shall also order the Respondent to make employees whole for any loss of earnings and other benefits resulting from its unlawful unilateral changes as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), plus interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall order the Respondent to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

The judge ordered notice reading by one of the Respondent's managers or a Board agent in the presence of one of the Respondent's managers. The judge also awarded reimbursement of negotiating expenses to the Union from February 25, 2016, until such time as Respondent begins bargaining in good faith, upon submission by the Union of a verified statement of costs and expenses. We agree with the judge that these special remedies are warranted in the circumstances here, which include consideration of the Respondent's recidivist unlawful conduct in continuation of bargaining violations found in *Richfield I*.¹³

Finally, for the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as the "traditional, appropriate" remedy for the Respondent's unlawful failure and refusal to bargain in good faith. *Id.* at 68.

In several cases, however, the United States Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, *supra* at 738, the court summarized its requirement that an affirmative

¹³ However, we do not adopt the judge's order that the Respondent permit the Union to bring a camcorder to the meeting and record the reading of the notice.

bargaining order “must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees’ § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.”

Although we respectfully disagree with the court’s requirement for the reasons set forth in *Caterair*, supra, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent’s unlawful conduct. By engaging in surface bargaining and thereby frustrating the very possibility of concluding a successor collective-bargaining agreement, the Respondent unlawfully deprived unit employees of the opportunity to secure the stability and predictability such an agreement would provide. In addition, the Respondent unlawfully implemented new terms and conditions of employment without bargaining with the unit employees’ representative to a valid impasse, further demonstrating its disregard of the employees’ Section 7 rights. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union’s continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. To the extent such opposition exists, moreover, it may be, at least in part, the product of the Respondent’s unfair labor practices.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent’s incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent’s failure to bargain in good faith to achieve immediate results at the bargaining table following the Board’s resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent’s unlawful surface bargaining with the Union in these circumstances because it would permit a challenge to the Union’s majority status before the taint of the Respondent’s unlawful conduct has dissipated, and before the employees have had a reasonable time to regroup and bargain through their representative in an effort to reach a successor collective-bargaining

agreement. Such a result would be particularly unjust in circumstances such as those here, where the unlawful surface bargaining caused undue and prolonged delay in the parties’ progress toward achieving a successor agreement—delay for which unit employees would probably fault their bargaining representative, at least in part—and where the Respondent’s unlawful unilateral changes absent a valid impasse would further tend to undermine the unit employees’ support for the Union. Thus, the Respondent’s unlawful conduct would likely have a continuing effect, tainting any employee disaffection from the Union for a period of time after the issuance of this decision and order. Moreover, the imposition of a bargaining order would signal to employees that their rights guaranteed under the Act will be protected. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the Respondent’s bad-faith surface bargaining in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC, Rochester, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surface bargaining by endeavoring to create the appearance of bargaining in good faith while taking actions to thwart the bargaining process and avoid reaching agreement.

(b) Unilaterally changing the terms and conditions of employment of its unit employees by implementing portions of its 2015 final offer without the parties having reached a lawful impasse.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time employees employed in the job classifications and at the hotels listed in Appendix A of the most recent collective-bargaining agreement, which is effective by its terms from October 1, 2011 through August 31, 2014, between the Union and

Sunstone Hotel Properties, Inc., as agent for The Kahler Grand Hotel, Rochester Marriott Mayo Clinic Area Hotel, and Kahler Inn & Suites; and all full-time and regular part-time employees employed in the job classifications listed in the Memorandum of Agreement, which is effective beginning on May 4, 2012, between the Union and Sunstone Hotel Properties, Inc., as agent for Residence Inn Rochester Mayo Clinic Hotel; excluding all other employees, guards and supervisors as defined in the Act.

(b) Rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on May 16 and July 7, 2016.

(c) Make whole eligible employees in the above-described unit for any loss of earnings resulting from the Respondent's implementing portions of its 2015 final offer on May 16 and July 7, 2016, without the parties having reached a lawful impasse, in the manner set forth in the amended remedy section of this decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(e) Compensate the Union for all bargaining expenses it has incurred or will incur during a period beginning February 25, 2016, and continuing until the Respondent begins bargaining in good faith. Upon receipt of a verified statement of costs and expenses from the Union, the Respondent promptly shall submit a reimbursement payment, in the amount of those costs and expenses, to the compliance officer for Region 18 of the National Labor Relations Board, who will document receipt and forward the payment to the Union.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form,

necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facilities in Rochester, Minnesota, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 25, 2016.

(h) Hold a meeting or meetings during working hours, which shall be scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read by one of the Respondent's management officials holding the rank of area managing director or higher in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of one of the Respondent's management officials holding the rank of area managing director or higher and, if the Union so desires, an agent of the Union.¹⁵

(i) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 26, 2020

John F. Ring,

Chairman

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹⁵ If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted and read within 14 days after service by the Region. If the facilities involved in these proceedings are closed due to the Coronavirus Disease

2019 (COVID-19) pandemic, the notices must be posted and read within 14 days after the facilities reopen and a substantial complement of employees have returned to work, and the notices may not be posted and read until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means.

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT engage in surface bargaining by endeavoring to create the appearance of bargaining in good faith while taking actions to thwart the bargaining process and avoid reaching agreement.

WE WILL NOT unilaterally change terms and conditions of employment of our unit employees by implementing portions of our 2015 final offer without the parties having reached a lawful impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time employees employed in the job classifications and at the hotels listed in Appendix A of the most recent collective-bargaining agreement, which is effective by its terms from October 1, 2011 through August 31, 2014, between the Union and Sunstone Hotel Properties, Inc., as agent for The Kahler Grand Hotel, Rochester Marriott Mayo Clinic Area

Hotel, and Kahler Inn & Suites; and all full-time and regular part-time employees employed in the job classifications listed in the Memorandum of Agreement, which is effective beginning on May 4, 2012, between the Union and Sunstone Hotel Properties, Inc., as agent for Residence Inn Rochester Mayo Clinic Hotel; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented on May 16 and July 7, 2016.

WE WILL make whole, with interest, eligible employees in the above-described unit for any loss of earnings resulting from our implementing portions of our 2015 final offer on May 16 and July 7, 2016, without the parties having reached a lawful impasse.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

RICHFIELD HOSPITALITY, INC. AS
MANAGING AGENT FOR KAHLER
HOTELS, LLC

The Board's decision can be found at www.nlrb.gov/case/18-CA-176369 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Tyler J. Wiese, Esq., for the General Counsel.
Karl Terrell, Esq., for the Respondent.
Martin Goff, Sr., for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. The law requires an employer to bargain *in good faith* with a union which is the exclusive representative of employees in an appropriate

bargaining unit. Pretending to negotiate while resolved not to reach agreement breaches that duty. Discerning such an intent here, I conclude that the Respondent engaged in unlawful “surface bargaining” rather than lawful “hard bargaining.”

Procedural History

This case began on May 17, 2016, when UNITE HERE International Union, Local 21 (referred to below as the Union or the Charging Party) filed a charge against the Respondent, Richfield Hospitality, Inc., as Managing Agent for Kahler Hotels, LLC. The Board’s Regional Office in Minneapolis docketed the charge as Case 18–CA–176369. The Union amended the charge on July 18, 2016.

On July 28, 2016, the Regional Director for Region 18, acting with authority delegated by the Board’s General Counsel, issued a complaint and notice of hearing. On September 12, 2016, the Regional Director issued an amendment to the complaint. The Respondent filed timely answers to the complaint and the amendment.

On October 4, 2016, a hearing opened before me in Rochester, Minnesota. The parties presented evidence on that day and the next. I then adjourned the hearing until November 18, 2016, when it resumed by telephone conference call for oral argument. The General Counsel and the Respondent also filed briefs.

Admitted Allegations

In its answer to the complaint, the Respondent admitted the allegations in paragraphs 1(a), 1(b), 2(a), 2(b), 2(c), 2(d), 3, 4, 7, 8, and 9. Based on these admissions, I find that the General Counsel has proven the allegations in these complaint paragraphs.

More specifically, I find that the charge and amended charge were filed and served as alleged.

The Respondent has admitted some, but not all, of the allegations raised in certain other paragraphs of the complaint. These admissions will be discussed below in connection with the individual unfair labor practice allegations.

Further, I find that the Respondent is a Colorado corporation and a Minnesota limited liability company and is engaged in the business of providing hospitality services at four hotels in the Rochester, Minnesota area. Based on the Respondent’s admissions, I find that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act and that it satisfies the Board’s standards for the exercise of its jurisdiction.

Additionally, I find that the following individuals are the Respondent’s supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Area Managing Director Bill Dwyer and Human Resources Representative Mary Kay Costello. Also, I find that until about May 10, 2016, Michael Henry held the position of human resources representative and in that capacity was the Respondent’s supervisor and agent within the meaning of Section 2(11) and 1(13) of the Act.

Based on the Respondent’s admissions, I find that at all material times, the Union, UNITE HERE International Union Local 21, has been a labor organization within the meaning of Section 2(5) of the Act. Further, I find that at all material times, the Union has been the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of the following unit, which

is an appropriate unit within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed in the job classifications and at the hotels listed in Appendix A of the most recent collective-bargaining agreement, which is effective by its terms from October 1, 2011 through August 31, 2014, between the Union and Sunstone Hotel Properties, Inc., as agent for The Kahler Grand Hotel, Rochester Marriott Mayo Clinic Area Hotel, and Kahler Inn & Suites; and all full-time and regular part-time employees employed in the job classifications listed in the Memorandum of Agreement, which is effective beginning on May 4, 2012, between the Union and Sunstone Hotel Properties, Inc., as agent for Residence Inn Rochester Mayo Clinic Hotel; excluding all other employees, guards and supervisors as defined in the Act.

In about October 2013, the Respondent became the employer of the employees in this unit, recognized the Union as the exclusive bargaining representative of employees in the unit, and assumed the collective-bargaining agreement which the Union had entered into with the predecessor employer. This agreement was effective by its terms from October 1, 2011, through August 31, 2014, and embodied the Respondent’s recognition of the Union as the exclusive bargaining representative.

The Respondent also has admitted, and I find, that at all material times, the Union has requested that the Respondent recognize and bargain with it as the exclusive representative of employees in the unit.

The Respondent has made certain further admissions which will be discussed below in connection with specific unfair labor practice allegations.

Contested Allegations

The 8(a)(1) Allegations

Complaint Paragraphs 5(a), 5(b), and 5(c)

Complaint paragraph 5 pertains to a previous unfair labor practice case involving the same Respondent. Paragraph 5(a) alleges that another administrative law judge, the Hon. Sharon Steckler, conducted a hearing in this prior matter, Case 18–CA–151245, on December 15, 16, and 17, 2015. Paragraph 5(b), concerning Judge Steckler’s decision, states as follows:

On May 27, 2016, Administrative Law Judge Sharon Steckler issued a decision and recommended order in Case 18–CA–151245 finding that Respondent violated Section 8(a)(1), (3), and (5) of the Act in various respects, including that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) by, inter alia:

“On and after February 28, 2015 discontinuing longevity pay increases without notifying the Union or negotiating to impasse;

“Proposing confusing terms and conditions of employment with the intent to stall negotiations, particularly with regard to proposed wages for unit employees;

Refusing to collectively bargain with the Union unless it made new proposals;

“Failing and refusing to provide the Union with information about the cost of health insurance.

Complaint paragraph 5(c) alleges that the Respondent has filed exceptions to Judge Steckler’s decision, that the General Counsel has filed limited cross-exceptions, and that these matters are pending before the Board.

The Respondent admits that Judge Steckler conducted the hearing and issued the decision. The Respondent’s answer further stated:

That recommended decision was filled with errors, reflecting a fundamental and egregious misunderstanding of the evidence presented to her. Respondent has filed Exceptions to that recommended decision.

Based on the Respondent’s answer, and taking administrative notice of the Board’s own records, I find that the General Counsel has proven that on December 15, 16, and 17, 2015, Judge Steckler conducted a hearing in Case 18–CA–151245, in which the present Respondent was the respondent. Further, I find that Judge Steckler issued a decision in that case on May 27, 2016. Particular findings in Judge Steckler’s decision will be discussed below as they relate to the present unfair labor practice allegations.

Complaint Paragraph 6(a)

Complaint paragraph 6(a) alleges that in about February 2016, the exact date being unknown, Respondent, by its Area Managing Director Bill Dwyer, at The Kahler Grand Hotel, “threatened an employee b questioning the effectiveness of the Union and claiming that the Union was not a real union.” The Respondent denies this allegation.

To prove this allegation, the Government relies exclusively on the testimony of Roberta Heyer, an employee working as a waitress in the coffee shop of The Kahler Grand Hotel. According to Heyer, in February and March 2016, the Respondent’s manager, Bill Dwyer, often ate at the coffee shop. Heyer testified that on one occasion, Dwyer brought up the subject of the Union:

Q. To the best of your recollection, when did this conversation occur?

A. It happened some time last winter, I thought maybe February or March.

Q. And when you say —February or March of what year?

A. Of this year, 2016.

Q. And was anyone present for your conversation with Mr. Dwyer?

A. No.

Q. And where did the conversation take place?

A. In the very back table in the Kahler Grand coffee shop.

Q. And, as best you can recall, what happened during this conversation?

A. He just, you know, he asked me, he said, “What does the Union do for you?” And so I told him the things that I felt that they did for us. And, you know, as far as benefits and seniority and things like that. We just talked about that in general, and then, you know, h/e was sort of —I don’t know. I mean, Bill

and I were always on friendly terms. But then he said that he wasn’t afraid of our little old Union, and that we weren’t really even a real union like they were in New Jersey, because you can’t work even in New Jersey, because of the unions. And I remember it specifically because I was so angry that I could barely talk to him.

Q. And was that the end of the conversation after he said that.

A. That was the end.

Dwyer did not testify and I credit Heyer’s uncontradicted testimony. Based on that testimony, I find that Dwyer did ask Heyer “What does the Union do for you?”

Those words were a direct quote. However, the rest of Heyer’s testimony does not seem to quote Dwyer verbatim, but instead appears to summarize or paraphrase his words. However, I do believe that Heyer reliably describes the gist of Dwyer’s remarks. She credibly testified that she specifically remembered what he said because she was angry.

Essentially, Dwyer expressed the opinion that the Union was not as strong as unions in New Jersey and that it was not strong enough to make him afraid. From the context, I conclude that when he said that the Union was not a “real union,” he was not using the word “real” to mean “in existence and not imaginary” but rather intended it the same way “real” was used in old body-building advertisements: A “real man” did not let a bully kick sand in his face. Dwyer was expressing the opinion that the Union, like the advertisement’s “90 pound weakling,” was not muscular enough, compared to unions in New Jersey.

This complaint allegation deeply implicates the First Amendment to the United States Constitution because the Government is attempting to hold the Respondent liable for an opinion expressed by one of its managers. More than that, the Government is seeking an order to prohibit the Respondent from engaging in similar conduct in the future.

Almost 5 decades ago, the Supreme Court stated that “an employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

The Supreme Court recognizes only a few quite narrow exceptions to First Amendment protection. For example, the Court has held that the First Amendment does not protect obscenity. *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973). The First Amendment also does not protect statements which are true threats. *Watts v. United States*, 394 U.S. 705 (1969); *Virginia v. Black*, 538 U.S. 243 (2003). In *Gissel*, above, the Supreme Court stated that the First Amendment protects “an employer’s free speech right to communicate his views to his employees.” Therefore, the Government must show that the expression of opinion falls within one of the narrow exceptions to First Amendment protection. Clearly, the obscenity exception would not apply to Dwyer’s words. Instead, the government relies on the threat exception.

Thus, the complaint alleges that Dwyer “threatened an employee by questioning the effectiveness of the Union and claiming that the Union was not a real union.” (Emphasis added.)

However, calling a statement a “threat” doesn’t necessarily make it one.

Indeed, the word “threaten” seems not a little inappropriate when applied to “questioning the effectiveness of the Union and claiming that the Union was not a real union.” What part of this expression of opinion portends harm?

A “threat” communicates an intention to cause harm. The intention may be conditional—for example, “if you do (or do not do) X then I will do Y”—and the exact harm need not be specified, but there must be some prospect of harm somewhere in the statement or else it is not a threat.

In addition to raising the possibility of harm, a threat also states or implies that the speaker, or the speaker’s principal, if the speaker is acting as an agent, will cause or bring about the harm. Thus, to say, “if you stand outside in a storm you may be struck by lightning” is a prediction, not a threat.

Nothing about “questioning the effectiveness of the Union” or saying that it was not a “real union” raises a possibility of harm. Likewise, nothing about these opinions suggests that the Respondent would cause harm.

On its face, Dwyer’s opinion does not convey a threat. However, there is a possibility that words innocuous on their face may actually convey a threat under particular circumstances.

For example, suppose someone said to a building owner, “that’s a nice building you have there; it would be a shame if it burned down.” Those words would communicate one message if the speaker were a well-known arsonist and extortionist, and a wholly different message if the speaker were the building owner’s silver-haired grandmother (unless, of course, the grandmother also happened to be a well-known arsonist and extortionist).

Another circumstance, the speaker’s apparent ability to take some action to effectuate a threat, also can affect the message communicated. The words in the hypothetical example above—“nice building . . . be a shame if it burned down”—will cause alarm even when spoken by the gentlest grandmother if she is holding a gasoline can and matches.

For that reason, what a supervisor says to a worker about the worker’s continued employment takes on special significance because the boss has the power to terminate that employment. If an employer already has discharged employees for their protected activities, that unfair labor practice also affects how an employee reasonably would understand an ambiguous statement.

Because circumstances can profoundly affect a listener’s understanding of the words spoken, the Board considers the totality of circumstances when it determines whether a particular statement conveys a threat. Additionally, the Board considers how an employee, under those circumstances, reasonably would understand the statement. Thus, the Board may find a statement to be a threat even if the actual listener did not feel threatened, if the words reasonably would have communicated a threatening message.

The complaint alleges that Respondent, by Dwyer, “threatened” employees. As discussed above, the Supreme Court has held that a statement which is a true threat falls outside the First Amendment’s protection.

Considering the totality of circumstances, I do not find that

Dwyer’s expression of opinion would reasonably have been understood to be a threat. No reasonable listener would have understood the statement to raise the prospect of impending harm or to suggest that the Respondent would cause such harm.

However, the Government, in arguing that Dwyer’s remarks violated the Act, departs from the theory raised in the complaint. As noted, the complaint alleges a threat, but the General Counsel’s brief states that Dwyer’s words “denigrated” the Union.

An employer violates Section 8(a)(1) of the Act when it denigrates the Union in the eyes of employees. *Regency House of Wallingford, Inc.* 356 NLRB 563, 567 (2011). For example, the Board has previously found that a supervisor’s statement to employees that a union was too weak to benefit employees violates the Act. *Albert Einstein Medical Center*, 316 NLRB 1040, 1040 (1995) (statement that union was weak and could not get employee anything violated the Act); *Lehigh Lumber Co.*, 230 NLRB 1122, 1125 (1977) (statement that union was no good and the employees ought to look for another union violated the Act). This is particularly the case when these statements take place in the context of other unfair labor practices that undermine employee support for the existing union. *Regency House of Wallingford, Inc.*, 356 NLRB at 567.

Server Roberta Heyer credibly testified that Respondent’s Area Managing Director Bill Dwyer initiated a conversation with her about the Union, proceeded to question what the Union did for her, and then told her that the Union “wasn’t even a real union.” (Tr. 179.) Respondent did not rebut these statements by calling Dwyer or even questioning Heyer on cross-examination. In line with the precedent discussed above, Dwyer’s statements to Heyer amounted to unlawful denigration of the Union.

Thus, the complaint in this case alleged one thing, that the Respondent, by Dwyer “threatened an employee” but the government then argued something else, “unlawful denigration of the Union.” Clearly, “threat” and “denigration” mean two different things.

To “threaten” means “to utter threats against, to menace, to inspire apprehension, to alarm or attempt to alarm.” To “denigrate” means to “blacken, sully or defame.” The words “threat” and “denigration” are not synonyms and their meanings are not even close.

Ordinarily, one makes a threat directly to the person he intends to intimidate. Sometimes a crafty bully will make a statement to a third person, knowing that the true target of the threat either will overhear or else will receive a report, but notwithstanding this stratagem, the threatener’s intent remains the same, to induce fear in the target so that the target will behave the way the threatener desires.

However, denigration has none of this assaultive flavor. Someone making a denigrating statement typically addresses it to a third person, not to the one being criticized. Often, the person who denigrates another will not even want the subject of his statement to find out about it.

Another difference between the two concepts concerns what response the listener can make. A threat expresses a speaker’s intention to do harm and thus affords little if any opportunity for reasoned discussion. The law has an interest in prohibiting true threats because they do not lead to talk but rather to intimidation

or violence.

By comparison, discussion provides an effective means of countering a denigrating statement because such criticism focuses on particular characteristics or actions. Both the facts and assumptions of a denigrating statement can be disputed in a peaceful discussion.

For present purposes, the most important difference between a threat and a denigration concerns legal consequences. True threats do not enjoy the protection of the First Amendment and therefore can be prohibited by the Government. The Supreme Court has never made a similar exception for mere criticism, whether justified or not.

The words “threat” and “denigration” differ so substantially in definition and consequence that substituting one for the other gives the appearance of what colloquially has been called a “switcheroo.” Most emphatically, I do not suggest that the General Counsel intended to plead one thing and prove another. Rather, the concepts of “threat” and “denigration” appear to have become entangled in the precedents.

However, the Supreme Court’s decisions interpreting the First Amendment place true threats in a special category. Fidelity to these rulings requires careful attention to the distinctions which the Court itself has drawn. Otherwise, government agencies might create an alternate universe of First Amendment caselaw at odds with the Court’s.

Fairness to the Respondent also requires that the General Counsel prove the theory of violation raised by the complaint, rather than a different theory. Neither the complaint nor the amendment to complaint raised a denigration theory.

Accordingly, I will decide the allegations related to complaint paragraph 6(a) by considering whether Manager Dwyer’s expression of opinion constituted a threat.¹ I find that it does not.

A threat communicates an intention to harm. However, whether Dwyer’s words are examined by themselves or along with the totality of circumstances, they do not convey that any harm will happen to the listener or to any other employee. Likewise, his words do not suggest that the Respondent would cause harm by taking any action or by refraining from performing any duty. Therefore, I conclude that the General Counsel has not proven the allegations raised by complaint paragraph 6(a) and recommend that the Board dismiss these allegations.

Complaint Paragraph 6(b)

Complaint paragraph 6(b) alleges that about June 7, 2016, Respondent, by its designated agent, at The Kahler Grand Hotel and

during collective-bargaining negotiations, threatened employees that they could face layoffs if they spoke about Judge Steckler’s decision. The Respondent denies this allegation.

The General Counsel’s brief argues that the Board’s recent decision in *Greenbrier Rail Services*, 364 NLRB No. 30 (2016), supports finding a violation. The brief describes the facts as follows:

Respondent’s attorney Terrell made statements that were even more egregious than those statements found unlawful by the Board in *Greenbrier Rail Services*. In this regard, multiple employees and Union representative Martin Goff testified that Terrell told employees that the bad press that they had been seeking against Respondent was hurting the business and that this could cause layoffs. Respondent did not rebut this evidence, despite Attorney Terrell being available to testify at the hearing. As testified to by these witnesses, Terrell’s statements amounted to a thinly veiled threat that if employees continued to engage in these protected activities, they could face layoffs. Unlike in *Greenbrier*, however, Terrell provided no contrary assurances to suggest that employees would not face layoffs for engaging in Section 7 activities. Accordingly, Terrell’s statements at the bargaining table were clearly unlawful.²

However, contrary to the General Counsel’s argument, Goff’s testimony does not indicate that Terrell said that the Union’s contacting the press “was hurting the business.” Rather, according to Goff, Terrell merely raised the possibility that unfavorable news coverage could result in financial harm to the Respondent. Goff testified, in relevant part, as follows:

Q. How do you recall negotiations beginning that day?

A. They started out with Karl giving a very brief synopsis of his understanding of negotiations. It was his first time at the table for the Employer. He expressed concern that employees had gone to —and talked to the press, the Post Bulletin Newspaper, and said *that should business be hurt*, that would cause layoffs with workers. He went on to say that the Company disagreed with the ALJ’s decision, that she was a Government employee and that her decision were recommendations and they were going to appeal to the full Board. [Italics added.]

Terrell did not testify. Crediting Goff’s testimony, I find that Terrell made the statement Goff attributed to him. Goff did not testify that Terrell said the Union was hurting the Respondent’s business by going to the press, and I find that Terrell did not make such a statement.

Would a speaker wishing to express a negative opinion about a union know where to draw the line separating criticism which the Board would allow from “denigration” the Board would prohibit? Likewise, is the standard sufficiently specific to prevent subjectivity and arbitrariness in enforcement?

² In a footnote, omitted from this excerpt, the General Counsel requested that I reconsider my ruling rejecting GC Exh. 25, a newspaper article quoting various employees critical of the Respondent. The General Counsel offered this exhibit to show that the employees were engaged in protected activity when they spoke with the newspaper. That clearly is true, and I so conclude. Therefore, I do not believe it necessary to reconsider my rejection of this exhibit.

¹ Applying solely a “threat” standard, I need not consider if or when the First Amendment would allow a government agency to forbid one person from “denigrating” another. Similarly, I neither consider nor decide whether a prohibition of “denigration” would be unconstitutionally vague. See, e.g., *Reno v. American Civil Liberties Union*, 531 U.S. 844 (1997).

In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Supreme Court struck down a state prohibition on “seditious” teachings. “The crucial consideration,” the Court held, “is that no teacher can know just where the line is drawn between ‘seditious and non-seditious utterances and acts.’” *Keyishian v. Board of Regents*, 385 U.S. at 599. See also *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (an ordinance prohibiting groups from engaging in “annoying” conduct was unconstitutionally vague).

Accordingly, I find that *Greenbrier Rail Services*, cited by the General Counsel, is inapposite. In that case, the Board considered a manager's statement that employees' union organizing activities "made things worse." The Board concluded that this remark "would send a clear message . . . that employees' organizing activity could lead to an adverse employment action. . ."

By comparison, Terrell did not assert that the Union's contacts with the newspaper had, in fact, harmed the Respondent's business but only spoke of that possibility. Indeed, his use of the word "should" indicated that he did not know if harm would result and did not claim to know.

Goff's use of the word "should" does not appear to have been accidental. A bit later in his testimony, Goff referred to Terrell "making a threat to lay off, *in case there was a loss of business due to newspaper articles . . .*" (Emphasis added.) The phrase "in case," like the word "should," signifies a possibility that hasn't yet happened or, at least, was not then known to have happened.

Unlike the manager in *Greenbrier Rail Services*, who said that the employees' organizing activities had "made things worse," Terrell only spoke of the possibility that the employees' protected activity might result in a loss of business.

Therefore, I find that the Government has failed to prove the threat alleged in complaint paragraph 6(b). Accordingly, I recommend that the Board dismiss the allegations related to complaint paragraph 6(b).

Complaint Paragraph 6(c)

Complaint paragraph 6(c) alleges that about June 7, 2016, Respondent, by its Area Managing Director Bill Dwyer, at The Kahler Grand Hotel during collective bargaining, threatened employees that union representation was futile by telling employees that the Union could not get them anything. The Respondent denies this allegation. The General Counsel's brief describes the allegation as follows:

Respondent further violated the Act at the June 7 bargaining session when its representative Bill Dwyer told employee members of the negotiating committee that the Union couldn't get them anything and that employees would be better off without the Union. The Board has held that statements of this nature violate Section 8(a)(1) of the Act, as they amount to an unlawful denigration of the Union. See, e.g., *Regency House of Wallingford, Inc.*, 356 NLRB at 567 (statements that union was harming employees and that the employees would be better off without the union); *Cherry Hill Convalescent Center*, 309 NLRB 518, 521 (1992) (supervisor's statement that union was attempting to cut benefits, that facility was better off before union came in, and that employees would be better off without a union violated the Act). Particularly in the context of these prolonged negotiations and Respondent's numerous and severe unfair labor practices, Dwyer's claim that the Union could not get employees anything was highly coercive, and thus unlawful.

³ Also based on Goff's credited testimony, I find that some name calling ensued, after which Dwyer looked at Goff and asked "And who are you? You look like Colonel Sanders." Then, Dwyer pointed at Goldman and said, "And I don't know what you look like at all." The

As noted above, Dwyer didn't testify. In determining what was said at the June 7, 2016 bargaining session, I rely on the credited testimony of Union official Martin Goff.

Complaint paragraph 6(c) pertains to events which took place immediately after Respondent's Attorney Terrell made the remark concerning the Union communicating with a local newspaper. As discussed above, Terrell raised the possibility that layoffs could result if unfavorable news stories harmed the Respondent. Goff described how he replied to Terrell's remark:

Q. What response, if any, did the Union have to Mr. Terrell's opening remarks?

A. Well, I remember that on the statement that he made concerning workers talking to the Post Bulletin Newspaper, I felt that that was trying to interfere with their Section 7 rights, and that making a threat to lay off, in case there was a loss of business due to newspaper articles, that that was possibly a violation of law.

Q. And after you said this, what do you recall happening next?

A. Bill Dwyer, who is the General Manager -- I believe that was his title -- got really upset and started to -- he started to point at all the workers who were sitting there on our side of the table, and he said, "I can't believe that you people," meaning the workers, "want these people," pointing at Nancy Goldman and myself, Brian and Linda, "to represent you." So he said, "I can't believe you people want these people to represent you, they can't get you anything and you should just leave the room."

Crediting Goff's uncontradicted testimony, I find some of the Respondent's bargaining unit employees attended this negotiating session along with the union officials, and that these employees heard the statements made by Manager Dwyer. Also based on Goff's testimony, I find that Manager Dwyer did tell employees attending this meeting "I can't believe that you people," wanted the Union's negotiators—Goldman, Brandt and Goff—to represent them. Further, based on Goff's testimony, I find that Dwyer then told the employees that these union negotiators "can't get you anything and you should just leave the room."³

In considering whether Dwyer's statements violated the Act in the manner alleged in complaint paragraph 6(c), I note that there is a problem similar to that encountered in connection with complaint paragraph 6(a). The complaint itself alleges a "threat" but the General Counsel's brief raises a denigration theory. First, I will consider whether the words amount to "denigration" and then will assess whether they constitute a threat.

Dwyer's words do not denigrate the Union, as such, but rather disparage the abilities of the particular Union negotiators. However, considering that Dwyer made his comment about "these people" during the course of negotiations, I believe that his words reasonably would be understood to refer to the Union as well as to the individual negotiators. Clearly, Dwyer's statement that "these people are so ineffective they cannot get you

complaint does not allege either the name calling or these bizarre statements to be threats or otherwise violative.

It may also be noted that, observing Goff as he testified, I did not notice any particular resemblance, in either features or attire, to the iconic chicken restaurateur.

anything” does qualify as a denigration.

Do the words also constitute a threat? Simply considering Dwyer’s words “in a vacuum” would lead to the conclusion that this criticism did not rise to that level. A “threat” conveys the message, either explicitly or implicitly, that the speaker intends to take some action (or refrain from taking some required action) which will result in harm to the listener or someone else. On its face, the statement “these people can’t get you anything” does not imply that the Respondent will take any action or refrain from any required action.

However, the Board considers the totality of the circumstances because circumstances indeed affect the message which words reasonably would convey to a listener. Thus, as noted in our earlier hypothetical, the silver-haired grandmother’s remark—“be a shame if it burned down”—communicates a different message if she says it while holding matches and a can of gasoline.

Circumstances which demonstrate a speaker’s ability, proclivity, or willingness to take a given action certainly affect how a listener aware of those circumstances will understand the message. One such circumstance concerns the authority with which Dwyer spoke.

This authority extended beyond Dwyer’s admitted status as Respondent’s supervisor and agent. He was, in fact, a high-ranking manager. His presence as one of the management negotiators signified that the Respondent had authorized him to express the Respondent’s position on labor relations matters. Moreover, after Dwyer said that the union negotiators could not get the employees anything, no other person on the management team disavowed Dwyer’s words. A listener reasonably would believe that Dwyer had expressed the Respondent’s position. Additionally, considering that no other management representative contradicted Dwyer, a listener reasonably would impute to the Respondent his vehement, almost rabid tone.

The Respondent’s past unfair labor practices, found by Judge Steckler and described in her decision, also would affect how a listener reasonably would understand Dwyer’s words. In the previous case, Judge Steckler found that the Respondent had engaged in conduct which constituted a failure to bargain in good faith and a violation of Section 8(a)(5) of the Act.

Significantly, the Respondent has not remedied those unfair labor practices or promised not to repeat them. Therefore, employees reasonably would assume that the Respondent’s future conduct would resemble its past. Indeed, Dwyer’s strident tone communicated a hostility beyond the words themselves. Because of this hostility, listeners reasonably would believe that the Respondent would persist in violating the Act.

⁴ The Board has developed an analytical framework for determining whether another type of speech to employees, a supervisor’s question about union activity, is lawful. This test, named after *Rossmore House*, 269 NLRB 1176 (1984) examines a number of factors, including where the supervisor asked the question. Likewise, the location of the speech at issue here reflects on its import. Although this factor is not dispositive, the physical circumstances certainly affect how listeners would interpret the words spoken. Dwyer’s opinion, expressed casually to an employee in a coffee shop, conveys a different message from taunting words spoken emphatically by a management representative at the bargaining table.

In these circumstances, listeners reasonably would understand Dwyer’s words to mean that the Union could not get employees anything because the Union was not strong enough to overcome the effects of the Respondent’s unfair labor practices, which likely would continue.

Another circumstance, and one particularly relevant to whether Dwyer’s words constituted a threat outside the protection of the First Amendment, is the Respondent’s legal duty to bargain with the Union in good faith. As noted above, communicating an intention to *refrain from doing something the law requires* is just as much a threat as expressing an intention to do something the law prohibits. Because of the unremedied past unfair labor practices and Dwyer’s hostility as he spoke, his words reasonably would be understood to signify an intention to engage in unlawful conduct which would *make* them powerless.

For purposes of First Amendment analysis, it is important to distinguish the circumstances present here from those discussed above in connection with complaint paragraph 6(a). That allegation concerned Dwyer’s voicing a negative opinion about the Union to a waitress in a coffee shop. Although some of the circumstances (such as the Respondent’s unremedied unfair labor practices) were the same, others were quite different.

Dwyer’s words in the coffee shop expressed his opinion about the strength of the Union as compared to unions in New Jersey. Dwyer’s words at the bargaining table went beyond such an expression of opinion. They confronted the union negotiators with a literally in-your-face taunt which disrupted negotiations. The parties then had to take a break while tempers cooled down.

Dwyer’s words on June 7, 2016, communicated contempt for the union negotiators and, by extension, contempt for the bargaining process itself. A listener aware of the Respondent’s past violative conduct reasonably would understand the words to signify a present and continuing intention to disregard its duty to bargain in good faith. Dwyer’s earlier words in the coffee shop did not, under the circumstances then present, convey such an intention.

In sum, for the reasons stated above in connection with complaint paragraph 6(a), I have concluded that Dwyer’s expression of opinion in the coffee shop did not truly communicate a threat. For the reasons stated immediately above in connection with Complaint paragraph 6(c), I conclude that Dwyer’s remarks at the June 7, 2016 bargaining session truly do communicate a threat.⁴

The First Amendment does not protect a true threat. Accordingly, I recommend that the Board find that the Respondent violated Section 8(a)(1) of the Act by the conduct alleged in complaint paragraph 6(c).⁵

⁵ As discussed above, the First Amendment does not protect speech which is a “true threat,” so the Board may order the Respondent not to threaten employees in the future. However, unless the Supreme Court should decide to create a similar exception to the First Amendment for “denigration,” any order prohibiting an employer from “denigrating” a union would be subject to the strict scrutiny accorded to any prior restraint on speech.

Supreme Court precedents long have condemned prior restraints on expression. See *Near v. ex rel. Olson*, 283 U.S. 697 (1931); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

The 8(a)(5) Allegations

The complaint includes a number of allegations that the Respondent has failed and refused to bargain with the Union in good faith, in violation of Section 8(a)(5) of the Act.

To establish a violation of Section 8(a)(5), the Government first must prove that an employer had a duty to recognize and bargain with a union. The Respondent has admitted that it does.

More specifically, the Respondent has admitted that at all times material to this case, the Respondent has recognized the Union to be the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of an appropriate unit of its employees.

The Respondent also has admitted that in October 2013, it became the employer of these employees and that it assumed its predecessor's collective-bargaining agreement with the Union. That agreement was active from October 1, 2011 through August 31, 2014. However, the Respondent and the Union agreed to extend this contract for 6 months. Because of this extension, bargaining for a new agreement did not begin until January 2015.

Typically, when an employer and newly certified or recognized union bargain for a first contract, the agreement they reach sets the pattern for future contracts. Therefore, bargaining for an initial agreement can be particularly rigorous. Technically, the Respondent and the Union were not negotiating a "first contract" when they began bargaining in January 2015, because the Respondent already had assumed the agreement the Union had reached with the Respondent's predecessor. However, the agreement being negotiated in 2015 and 2016 would be setting precedents in the parties' relationship much as an initial contract does.

This fact is significant because I must decide whether the Respondent was bargaining in bad faith, with an intent to avoid reaching agreement, or whether the Respondent was bargaining in good faith but "hanging tough" to obtain the best possible agreement. Parties tend to be particularly tenacious when negotiating a first contract, which I will keep in mind in considering the Respondent's intent.

For clarity, it may be helpful to note that the present decision somewhat resembles the second reel of a movie. The "first reel," Judge Steckler's decision, focused on Respondent's bargaining in 2015. The parties had begun negotiating in January of that year. Then, on April 29, 2015, the Union filed an unfair labor practice charge against the Respondent and later amended it twice. That charge led to the hearing which Judge Steckler conducted on December 15, 16 and 17, 2015. Her resulting decision, the "first reel," concerned this 2015 bargaining.

Complaint paragraph 12(a) alleges, and the Respondent

admits, that after the hearing before Judge Steckler in December 2015, the Respondent and the Union did not have a further bargaining session until February 25, 2016. In the present decision, the "second reel" of the movie begins with this bargaining session.

Complaint Paragraph 12(b)

Complaint paragraph 12(b) alleges that at this February 25, 2016 bargaining session, the Respondent "maintained its position that its proposal for a collective bargaining agreement was its 'last, best, and final' offer dated March 24, 2015." The Respondent's answer denies this allegation.

The record does not establish that any management representative specifically said any words to the effect of "we maintain our position that our proposal is our last, best and final offer." However, the credited testimony of Union Representative Goff does establish that the Respondent did not offer a new proposal. The Union did submit a new proposal, and Goff's testimony indicates that discussion of the Union's proposal took up most of the meeting:

Q. Okay. Who presented the proposal?

A. Nancy Goldman presented it to Michael Hen

Q. And did the Union actually talk through this proposal with the Employer at the bargaining table?

A. Yes, Nancy Goldman went through each step and read each step to Michael Henry.

Q. And what were the Employer's responses as Ms. Goldman read through the proposal?

A. They didn't make necessarily specific responses at the time. They listened.

Q. And after the Union finished reading through this proposal, what happened next?

A. Michael Henry said that the people that he had to speak with were not available and that he couldn't do any more, so he considered the negotiations done for the day.

Q. And during this discussion over the Union's February 25th proposal, did the Employer express any willingness to move off its wage proposal for current employees?

A. No, it did not.

Q. Were there any tentative agreements reached?

A. No, there were not.

The language of complaint paragraph 12(b) might be read to imply that the Respondent expressed unwillingness to make a concession. Such an implication would be incorrect. The

presumption even when it sought to prevent the publication of a secret military document during an ongoing war, could the Government prevail in seeking to prohibit an individual from expressing an opinion about a union?

Additionally, a Board order typically prohibits not only a repetition of the violative conduct but also any "like or related" conduct. The absence of a clear line separating permissible criticism from unlawful denigration would leave a respondent wondering exactly what speech would constitute a "like or related" violation and thereby would chill expression which the First Amendment protects.

The order in the present case extends only to true threats which the First Amendment does not protect.

Perhaps the most famous of the Supreme Court's prior restraint cases, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971), concerns an attempt by the Government to prevent the newspaper from publishing a secret military study concerning the Vietnam war, while that war still was being fought. In *s per curiam* decision, the Court held that an injunction against the newspaper would be an unconstitutional prior restraint.

Citing *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70 (1963), and other precedents, the Court stated: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times v. United States*, 403 U.S. at 714. Considering that the Government did not overcome that

Respondent did not make a concession at this meeting but failing to make a concession is not the same thing as stating that it was unwilling to do so in the future.

Based on Goff's testimony, I conclude that the Respondent's chief negotiator wished to discuss the Union's new proposal with management officials before deciding whether to agree to it or to make a counterproposal.

Complaint Paragraph 13(a)

Complaint paragraph 13(a) alleges that the Respondent, in an email dated March 1, 2016, "notified the Union that the parties were at impasse and that it intended to implement portions of its 'last, best, and final' offer dated March 24, 2015." The Respondent admitted this allegation⁶ and I so find.

Complaint Paragraph 13(b)

Complaint paragraph 13(b) alleges that in an email dated March 4, 2016, the Respondent notified the Union that it no longer intended to implement portions of its last, best, and final; offer dated March 24, 2015. The Respondent admitted that allegation⁷ and I so find.

Complaint Paragraph 13(c)

Complaint paragraph 13(c) alleges that the Respondent, in an email dated March 16, 2016, informed the Union that the parties were at a "single-issue impasse" over Respondent's wage proposal, as contained in its March 25, 2015 "last, best, and final" offer. The Respondent did not deny the allegation and devoted three paragraphs of its answer to discussing these allegations. It is difficult to characterize these paragraphs except to say that they leave me with the distinct impression that the Respondent is admitting the allegations, but I am not 100 percent sure.

However, the record includes this March 16, 2016 email from the Respondent's area managing director of human resources, Michael Henry to Union President Goldman. It states:

We will have written responses to you shortly, responding to your written proposal. As stated in my March 1 email, while we acknowledge "the Union on February 25 made a few moves on a handful of Issues," the fact remains, as also stated, that "our respective positions on . . . the major economic issues have long remained, and continue to remain, frozen." Nonetheless, as to the "handful" of proposals you did make, we are certainly prepared to continue and complete those discussions.

The fact that you have made this handful of proposals doesn't change the fact that we are at Impasse over a single IssueCwages. The Items Identified In my March 1 email, as ripe for Implementation, make up the parts of our wage proposal (in addition, we gave notice to Implement our vacation proposal, and we noted an apparent "TA" on section 119).

The Union has made no new moves with respect to any of the components of our wage proposal, with the exception of your agreement to the proposed new start rates for the first year ("2015"). However, the Union continues to reject (a) the start

rates for the remaining four years, (b) the change to banquet compensation, (c) the schedule of wage Increases for current employees, and (d) the elimination of daily overtime.

After 7 meetings at the beginning of 2015, in which the company made several moves, we made our last best & final (LBF) offer. Our wage proposal hasn't changed. The Union's steadfast opposition to this wage proposal hasn't changed either, nor has the Union made any moves in the direction of our proposal (with the exception, again, regarding the first-year new start rates).

You indicate in your email that we had an off-the-record discussion. In which you offered 3 different ideas for reaching a settlement. Please confirm in writing those 3 Ideas. I don't recall that our discussion was all that lengthy. I do recall you indicated a willingness to consider a short-term agreement. You also mentioned, as stated in your proposal, acceptance of the first year new start wages, and you mentioned something which drew a comparison to the TCS contract.

While I am asking that you put your 3 Ideas in writing, I will respond here, as well as I can, to what I understand concerning your "3 Ideas." First, our LBF proposal calls for 5 years. We are not interested in a short-term contract. After all the effort and time we've put into these negotiations, we are not interested in such a contract. In which the only change with regard to ages is the adoption of the first year new start wages. Second, as for your remarks concerning TCS, I need you to elaborate what you are suggesting (bear in mind, I was not involved in the separate TCS negotiations).

As we have long maintained, in order to secure and preserve profitable success, the company must move forward with the wage proposal we've made. This is far and away the single most important issue. And yet, the Union is unwilling to budge in our direction. We have been exceedingly patient in allowing the Union time to make meaningful proposals that fit within our need for wage relief. Your Union appears unwilling to do so, and has made instead only small moves on minor issues. While we're willing to address those minor issues, the overall positions of the parties appears frozen over the Union's inability to accept our wage proposal, and over our unwillingness to budge on that issue.

Again, please send in writing your 3 ideas, so that we can be sure we understand your position, and so that we can provide a complete response.

The wording of the email differs slightly from the description of it in complaint paragraph 13(c). Instead of stating that the "parties were at a 'single-issue impasse'" the email itself stated "we are at Impasse over a single IssueCwages." However, this difference is insignificant. Therefore, I conclude that the General Counsel has proven the allegations in complaint paragraph 13(c).

Complaint Paragraph 13(d)

Complaint paragraph 13(d) alleges that in "an email dated

⁶ After stating that it admitted the allegation, the Respondent's answer continued with extensive brief like argument. This argument does not change or modify the Respondent's admission.

⁷ The Respondent's answer admits the allegation and then continues with several paragraphs of brief like argument which does not contradict or diminish the admission.

May 5, 2016, Respondent again informed the Union that the parties were at a ‘single-issue impasse’ over Respondent’s wage proposal, as contained in its March 25, 2015 ‘last, best, and final’ offer, and further stated to the Union that on May 12, 2016, Respondent would implement portions of its ‘last, best, and final’ offer dated March 25, 2015.”

The portion of the Respondent’s answer devoted to this allegation is quite lengthy, describing correspondence between the Respondent and the Union before the May 5, 2015 email.⁸ After thus setting the stage, the Respondent concludes: “Respondent admits it once again declared impasse, and that it gave notice anew of its intent to partially implement over the deadlocked issue of wages.”

This sentence substantially admits the allegation. However, it doesn’t admit another allegation raised in complaint paragraph 13(d), namely, the allegation that the Respondent’s May 5, 2015 email told the Union that the Respondent intended to implement portions of its final offer on May 12, 2016.

The email, which has been received into evidence, did notify the Union that the Respondent intended to implement parts of its final offer. However, the email informed the Union that the Respondent would begin implementation on May 16, 2016, not May 12, 2016. The May 5, 2016 email, from Human Resources Manager Henry to Union President Goldman, states as follows:

On March 25, I provided a detailed written response to the Union’s last proposal. We asked for a meeting, and offered three dates (3/30, 4/6 and 4/7). On April 2, having not heard from you, I asked you to provide some dates. You responded on April 4, but expressed no interest in meeting.

⁸ The Respondent’s decision to lengthen its answer by describing correspondence before the May 5, 2016 email suggests that it believed this history important to present an accurate picture. The Respondent makes a valid point. The Board has stressed that the “totality of circumstances” should be considered when evaluating whether a respondent has bargained in good faith. *CTS, Inc.*, 340 NLRB 904 (2003). Therefore, the Respondent’s full answer to complaint par. 13(d) is set forth below:

This paragraph in the complaint references an “email dated May 5, 2016” from Respondent. The complaint, however, skips over and ignores critically important communications between the parties sent earlier, on March 25, April 2, 4, and 8, which Respondent shall now describe:

March 25, 2016 email from Henry to Goldman—Respondent sent, attached to his email, a written response to Union’s February 25, 2016 proposal (which also was in writing). As noted above, Mr. Henry had previously acknowledged in his March 1 email to Goldman that the Union had “made a few moves on a handful of issues,” on February 25. The company’s March 25 document responded, in detail, to all content in the Union’s February 25 document, including those “few moves” made with respect to a “handful of issues.” These responses included tentative agreements with respect to some of those moves. With respect to others, requests for clarification were set forth. With respect to those positions of the Union the company rejected, the company’s reasons in support were restated. Also, in the email, Henry proposed “to meet with [Goldman] for bargaining on any one of the following dates on the phone or in person:” March 30, April 6 or April 7. He stated also: “As requested, in advance of meeting, please provide me with a written statement of the ‘3 different ideas to try and reach a settlement,’ which you mentioned in your March 11 email.”

April 2, 2016 email from Henry to Goldman Henry stated: “I have not heard from you,” in response to the two previous emails, discussed

I emailed you again on April 8. I have heard nothing from you since then.

At this point, with regard to our wage proposal, and the critically central economic issue of banquet department compensation, a clear impasse has been established. Accordingly, effective as early as May 16, the company will execute the following partial implementation:

The new-hire starting wages, set forth in our proposed Appendix A, will go into effect over the remainder of the five-year term identified in that schedule. We had proposed previously that these wages would become effective April 24, 2015. In view of the delay in getting to this point, however, these new-hire rates will instead take effect starting on the date indicated above (May 16), and will run through the remainder of the originally proposed period of time.

The spreadsheet of wage-increases for existing employees will also go into effect for the same period described in the immediately preceding bullet point. This spreadsheet will be updated to include all employees on the payroll as of the effective date of implementation (again, May 16).

This implementation includes, of course, our proposed sections 111 and 112, related specifically to banquet wages.

Implementation of our proposed section 77; changed to offer hours to less senior staff other than over-time to most seniors if they are already working 40 hours for the work week.

The implementation of section 125 and 126 as it relates to the accumulation of sick time and the max balance that can be sold.

above, dated March 16 and March 25. At that point, the offered date of March 30 had come and gone. He indicated, though, that April 6 and 7 were still available, and then stated if those dates “are not convenient, please suggest a few dates over the next two (2) weeks that better fits your schedule.” Henry also requested, again, for Goldman to “send in writing your 3 ideas.”

April 4, 2016 email from Goldman to Henry—Goldman responded, but used the opportunity only to posture with claims regarding past bargaining conduct. Goldman (i) did not acknowledge receipt of the March 25 document, which had responded in totality to the union’s February 25 document; (ii) did not respond to the request for bargaining dates; and (iii) did not provide her “3 ideas.”

April 8, 2016 email from Henry to Goldman Henry stated, after responding briefly to Goldman’s posturing: “We again ask to meet, for at least three purposes.” The three purposes were listed:

- (1) to address the issues identified in our document sent on March 25;
- (2) to provide you with an opportunity to respond further or to make any moves with respect to the items on which we are firm. But, if you’re unwilling to budge, then so be it; and
- (3) to hear you out on the “3 ideas” you said you have “to try and reach a settlement.” I ask again that you provide those 3 ideas to me in writing.

May 5, 2016 email from Henry to Goldman (the email addressed in paragraph 13(d) of the complaint) As memorialized in this email, the Respondent had “heard nothing” from Goldman or the Union since Henry’s last email, sent April 8. Moreover, a total of 41 days had passed since Henry’s March 25 request for a meeting, during which the union refused to meet, or even propose or agree on dates to meet. Respondent admits it once again declared impasse, and that it gave notice anew of its intent to partially implement over the deadlocked issue of wages.

In making this implementation, the scheme of anniversary-date increases will end.

We will implement also sections 66 and 76 of our last, best & final proposal, related to the elimination of daily overtime.

Regarding our proposal for an enhancement to vacation entitlement, as no new position has been proposed by the Union, this will be implemented as well.

We appear to have a 'TA' with respect to section 119, fixing accumulation at 240 hours. This will be implemented as well.

The change in the language in APPENDIX F which has been proposed will be implemented as well.

In conclusion, as we are plainly at impasse, implementation will proceed as described above. Should you have any response to this, please advise.

The email clearly identified May 16 as the implementation date. Crediting the email as the best evidence of its contents, I find that on May 5, 2016, the Respondent notified the Union that it would implement parts of its final offer and that the implementation would take place on May 16, 2016.

Complaint Paragraph 14

Complaint paragraph 14 alleges that in emails dated May 5 and 16, 2016, the Respondent informed the Union that it was only willing to meet if the Union presented a new proposal. The Respondent's answer states:

Denied. Respondent never stated or suggested, as alleged, "that it was only willing to meet if the Union presented a new proposal." This allegation, when understood in the context of the full bargaining history, is false, and is at odds with the written communications. [The Complaint in this paragraph refers to emails by Respondent dated May 5 and 16, but ignores the Company's email, sent by Bill Dwyer—the company's Area Managing Director—dated May 12; Respondent shall return, below, to the May 16 email, but addresses first the May 5 and 12 emails.] With respect to the bargaining history, as the context leading up to May 5 and 12, the company had been asking for a meeting since March 25. That request was ignored for 41 days—from March 25 to May 5. The company then continued to express its willingness to meet, after May 5. In the emails sent May 5 and May 12, the company plainly invited the Union to make a new proposal in response to its wage proposal—a proposal, it must be remembered, that had been on the table over a year, since March 24 2015, as to which the Union had never made any counter-proposals or compromise moves (with the exception of the minor move, in February, in accepting the first-year new-hire wage, addressed above). The May 5 email stated that the meeting was "to provide [the union] with an opportunity to respond further or to make any moves" on the wage issue. The May 12 email affirmed that Respondent was willing to receive a "new proposal" from the union. At no point did the company ever take the position it would accept only a capitulation to its March 24, 2015 wage proposal. There was nothing to prevent the Union from making any proposal on wages that it wished. The union would be free, in this meeting requested by the company, to make a small move, a more

substantial move, or no move at all. Were the Union willing, however, to make some movement, the company—in the interest of getting a contract and restoring labor peace—could have found itself willing to make a move of its own. The odds of this happening, and of resulting in a contract, would turn, of course, on how much of a move the union might make. As it happened, though, at all points in time prior to the planned May 16 implementation (of which the union had notice, on May 5), the union chose to make no move at all. [As noted above, this paragraph of the complaint referenced a May 16 email—the only email from Respondent on that date was from Bill Dwyer to union representative Brian Brandt, affirming the proposal provisions implemented that day.]

Complaint paragraph 14 essentially raises two allegations, that in a May 5, 2016 email the Respondent informed the Union it was only willing to meet if the Union presented a new proposal and that in a May 16, 2016 email it made the same statement. I will examine these two allegations in chronological order.

The entire text of the Respondent's May 5, 2016 email is set out above in the section addressing complaint paragraph 13(d). Nothing in that email states that the Respondent was only willing to meet if the Union presented a new proposal.

The record includes a May 16, 2016 email from Manager Bill Dwyer to the union president. This email explains which terms of the Respondent's final proposal were being implemented on that date. However, this email does not state that the Respondent only was willing to meet if the Union offered a new proposal.

Although the evidence does not support the precise allegation in complaint paragraph 14, namely, that on May 5 and 16 the Respondent informed the Union that it was only willing to meet if the Union presented a new proposal, it is worthwhile to examine the correspondence between the parties between May 5 and 16.

After receiving the Respondent's May 5, 2016 email, Union President Nancy Goldman replied on that same date. Her email stated:

The Union, for its part has repeatedly moved and changed its proposals to try and meet the Employer's concerns. The Employer has repeatedly after receiving those proposals, left the room and not returned for the remainder of day. Our proposals then are answered via email, with nothing but rejections. The Employer has not even attempted to address Union concerns or counter any of the Union's proposals. You expect us to negotiate against ourselves. This has been a pattern with you. Local 21 does not believe that the Parties are at impasse and is willing to meet. If you choose to implement your "final offer", we will be forced to file new bad faith bargaining charges with the NLRB. We are willing to meet and further discuss a good faith settlement Agreement. We are available May 12, 24, or June 7, or 9 to meet for the purpose of collective bargaining.

Henry replied on May 6, 2016. His email to the Union stated:

Does the Union have any proposals to make? We have received no substantive responses or new proposals our detailed response & counter to your written statement of position of February 25. You have also not responded to our requests to meet

for discussions. In addition, despite my repeated requests, you have failed to clearly identify the three Ideas you said you had for reaching resolution. Mere willingness to meet is not enough to break Impasse. We are clearly at Impasse. The National Labor Relations Act does not require us to engage in a ‘fruitless marathon’ of negotiations. And so, I ask again: Does the Union have any proposals to make?⁹

On Monday, May 9, 2016, Union President Goldman replied to Henry’s May 6 email. She disputed Henry’s claim that the Union had not responded to requests to bargain and took aim at Henry’s “mere willingness to meet” comment:

Michael: Actually a mere willingness IS essential and key to reaching an agreement BOTH parties must have a willingness to want to resolve issues and move forward, and a willingness to rethink and compromise their ‘positions. While the NLRA may not require us to engage in a ‘fruitless marathon’ of negotiations, it also does not allow one side to demand preset conditions or proposals from the other party. You claim we have not responded to our requests to meet for discussions. In my email from May 5th we offered several dates to meet but in your email below, but you did not respond that. Are you refusing to meet?

On May 10, 2016, Henry emailed Goldman that he was taking a job with another company and that Dwyer would assume the role as the Respondent’s chief negotiator. Also on May 10, 2016, Goldman notified the Respondent that it would no longer be available for negotiations on two of the dates that it had offered, but remained available to meet on June 7 or 9.

On May 12, 2016, Dwyer sent Goldman an email concerning the Respondent’s willingness to meet. It stated:

We are at impasse on the issues related to wages. Implementation is ripe, and will go forward.

Michael offered, in his April 8 email, to meet regarding the following three (3) items:

1. To address the issues identified in Michael’s document sent on March 25
2. To provide you with an opportunity to respond further or to make any moves with respect to the items on which we are firm (i.e. the wage issues, as to which we are at an impasse)
3. To hear you out on the “3 ideas” you said you have “to try and reach a settlement”

Between April 8 and May 5, you refused to meet. Our position at this point is the following:

- A. We are still willing to meet related to item (1)
- B. As for item (2), we are not willing to meet related to the impasse issues we are implementing, unless you have a new proposal to make
- C. As for item (3), Michael has asked you repeatedly to identify those three ideas in writing. You have declined to do so. Absent that, it is hard to justify a meeting on that basis.

⁹ It seems a bit odd that Henry would accuse the Union of not responding to requests to bargain and then state that “Mere willingness to meet is not enough to break impasse.” Considering that the Union had warned that it would file unfair labor practice charges if the Respondent

Respondent sent this May 12 email a week after it had announced it was going to implement portions of its wage proposal. The email did state that it was willing to meet regarding these matters only if the Union had a new proposal to make.

As noted above, the Respondent did send the Union an email on May 16, 2016, explaining what parts of its wage proposal it had implemented that day. However, this email did not state that the Respondent was unwilling to meet unless the Union made a proposal.

Therefore, if the Respondent made any statement about willingness to bargain at all similar to that alleged in complaint paragraph 14, it was the statement in Dwyer’s May 12 email. However, this email did not say that it was only willing to meet if the Union made a proposal, the statement alleged in complaint paragraph 14. To the contrary, it expressed the Respondent’s willingness to meet, without any preconditions, on certain matters.

In sum, I conclude that the government has not proven that Respondent sent an email to the Union, either on May 5 or May 16 or at some time in between, which stated it was only willing to meet if the Union presented a new proposal. However, I also find that the Respondent, on May 12, 2016, told the Union that it would not discuss its wage proposal further unless the Union offered a new proposal on wages.

Complaint Paragraph 15

Complaint paragraph 15 alleges that on “about May 12, 2016, Respondent unilaterally implemented portions of its ‘last, best, and final’ offer, including its wage proposal.” The Respondent’s answer states: “Denied. The partial implementation occurred on May 16.”

As discussed above, the record establishes that the Respondent implemented parts of its proposal on May 16, 2016. I so find.

Complaint Paragraph 16

Complaint paragraph 16(a) alleges and the Respondent admits that the Respondent and Union resumed negotiations on June 7, 2016. The Respondent also admits that the parties reached some tentative agreements at that meeting, as alleged in complaint paragraph 16(b). I so find.

Complaint Paragraph 17(a)

Complaint Paragraph 17(a) alleges that on June 22, 2016, Respondent informed the Union, in writing, that Respondent has not budged on any of its wage proposals since making its last[,] best[,] and final offer, on March 24, 2015” and that it believed the parties were still at impasse on the critical topic of wages. The Respondent’s answer stated:

Denied. The incomplete quote in this complaint paragraph, lifted from the June 22, 2016 letter—in which the company accurately stated it “had not budged on any of its wage proposals”—is *intended to be misleading*. It is *taken out of context* within the letter, and out of context with the bargaining history. The complaint’s disingenuous use of this quote ignores, first,

implemented its wage proposal, and considering how recently the Respondent’s records had been introduced in a Board proceeding, Henry might well have been writing an email not merely to be read by the Union but by the Board as well.

the fact that the parties held seven bargaining sessions before the company made its March 24, 2015 wage proposal. Second, the complaint's use of this quote ignores the statements in the company's June 22 letter (and in the history recited above) tied to the company's willingness to receive a proposal from the union on wages. This willingness had been expressed by the company since March 25, 2016. [Italics added.]

Because the Respondent contends that the complaint takes the letter's words out of context, creating a misleading impression, the letter should be examined particularly carefully to determine whether the language in complaint paragraph 17(a) misleads. Here is the text of that June 22, 2016 letter from the Respondent's counsel, Arch Stokes and Karl M. Terrell, to Union President Goldman. For clarity, I have italicized the words quoted in paragraph 17(a) of the complaint:

This letter is from both of us signing below (both of us, as you know, have participated in this bargaining).

Our client has costed out and considered your proposal made on June 7, and shall respond by this letter. We start from the fact the company *has not budged on any of its wage proposals since making its last best and final offer, on March 24, 2015.*

One year and one day later, on March 25, 2016, the company responded in detail to your proposal made February 25, 2016, in which you had made minor moves on minor issues. The company, in its March 25, 2016 response, remained firm on its wage proposals. Nonetheless, the company offered to meet and discuss the various open issues, as identified in the exchange of the two documents dated February 25 and March 25.

Over the length of 41 days—from March 25, 2016 to May 5, 2016—the company repeatedly asked for days to meet. You declined all of these invitations, and made no new proposals related to wages, even though the Union was certainly free to do so, and was invited to do so. Michael Henry, for example, in his April 8 email to you stated that the meeting proposed by the company would “provide you with an opportunity to respond further or to make any moves with respect to the issues on which we are firm,” stating further: “But, if you're unwilling to budge, then so be it”

At the end of this 41-day period, on May 5—having received no agreement to meet and no new proposals—Michael Henry sent notice to you, advising of the company's intent to implement specific, identified LBF proposals, “effective as early as May 16.”

then, later in the day on May 5, did you finally agree to meet. You proposed May 12 as a meeting date, along with May 24, and June 7 and 9. Michael Henry emailed you the immediate next day, and directly asked if you had any proposals to make. You responded on May 9 and on May 10, but you made no new proposals, nor did you promise—or even indicate—that proposals would be made. In your May 10 email (to Bill Dwyer), you retracted your offered dates of May 12 or 24, leaving June 7 or 9 available.

On May 12, Bill Dwyer emailed you, affirming the impasse, and affirming also the company's willingness to meet and

discuss the issues identified in Michael Henry's March 25 document. In addition, with respect to the wage issues at impasse, Bill stated the following: “We are not willing to meet related to the impasse issues we are implementing, unless you have a new proposal to make” (emphasis added).

You declined to take up Bill's May 12 suggestion to make such a proposal. Implementation, accordingly, proceeded on May 16, as confirmed that day by Bill's email to Brian Brandt.

As has been stated several times, it is more than obvious—given the deadlock over the single issue of wages—that the parties have been unable to reach a final agreement. We have, nonetheless, remained willing to meet on any other issues which can be negotiated. To that end, we accepted one of the dates you proposed—June 7—and we met that day. A number of minor-issue agreements were reached, and are memorialized in the attached document.

At the end of the June 7 meeting, you made a new wage proposal, which you then provided in writing later that day. The proposal, however, comes too late. The proposal, even assuming it had been more timely made, does not move anywhere close enough to bridge the gap that stood between the parties for over a year—from March 24, 2015 to May 16, 2016. The proposal is rejected.

Your June 7 proposal also restated the same H&W proposal that the Union made on February 25, 2016. That proposal is rejected, once again, based on cost. The status quo of the H&W provision, a set forth in the expired agreement, shall remain in place.

We have costed out the other ‘economic’ proposals you made at the end of the day on June 7. These proposals, together with the Union's wage and H&W proposals, are considerably more expensive—separately, and in the aggregate—than the cost of the company's LBF offer. On that basis, consistent with our long-maintained position of the need for the company to align itself more competitively within the Rochester market, these proposals are rejected.

Again, we have attached a memorandum listing the minor-issue agreements we reached on June 7, we wish to add, here, a few additional comments concerning two other issues discussed on June 7:

Section 76 of our LBF proposal (allowing the company to temporarily move employees from one hotel to another—please see the comments on this proposal in Michael Henry's March 25 document, in which he offered—for clarification purposes—the following language: “. . . and provided further that all of the employees in the classification at the hotel to which the employee will be moved are scheduled for and able to work their forty (40) hours.” In our meeting on June 7, the Union again rejected this proposal, notwithstanding the clarifying language. Please note, in addition, that Section 76 was one of the proposals identified by Michael on May 5 as ripe for implementation on May 16. Nonetheless, this proposal was NOT implemented that day, inasmuch as we wanted to see if we could obtain your approval of this Section with the addition of the clarifying language. Alas, as noted above, this proposal was

rejected. Accordingly, you are hereby advised that Section 76, with the added clarifying language, will be implemented the beginning of the first workweek following July 7. If you wish to discuss this proposed implementation further, or make a counter, we are willing to entertain any and all suggestions.

Temporary Employees—We made a modest move off our LBF position, in the June 7 negotiation, by offering to reduce the 24-week period in that proposal to 20 weeks. We did so in hopes of closing the gap between our LBF position and the position of the Union (as expressed in its February 2016 proposal). You not only declined to close this gap, you declared—as stated in your notes on our June 7 meeting (sent June 7)—that the “UNION Proposed to Delete entire Article.” As we understand this, and your comments on June 7, the Union has not only withdrawn its previous compromise proposals to our LBF proposal on this issue, the Union has declared its desire to remove altogether from the contract any provision relating whatsoever to temporary employees {i.e., including the provision as it stood, in Article 2, in the expired contract}. Consequently, given this regressive position, the impasse concerning this particular issue is more fixed than before. Accordingly, you are hereby advised that the company’s LBF proposal (using 20 weeks) will be implemented the beginning of the first workweek following July 7. If you wish to discuss this issue further, we are willing to entertain any and all suggestions.

Because the words quoted in complaint paragraph 17(a) do indeed appear in the Respondent’s counsel’s June 22, 2016 letter, I conclude that the General Counsel has proven that allegation. However, in weighing the import of those words, I will consider them in the context of the entire letter and, indeed, in the context of the totality of circumstances.

Complaint Paragraphs 17(b) and (c)

Complaint paragraph 17(b) alleges that in the same June 22, 2016 letter from the Respondent’s counsel to the union president, the Respondent further informed the Union that it planned to implement its proposals related to temporary employees and temporary assignments between different hotels. The Respondent admits this allegation and I so find.

The Respondent also admits that on July 7, 2016, it unilaterally implemented these proposals, as alleged in Complaint paragraph 17(c). I so find.

Complaint Paragraph 18

Complaint Paragraph 18 alleges that since about February 2016, Respondent has engaged in surface bargaining by, among other actions:

“Refusing to bargain over wages, in spite of the fact that Respondent’s wage proposal was found unlawful in the decision and recommended order described above in paragraph 5, subparagraph (b);

“Conditioning bargaining with the Union on the parties not discussing wages;

“Repeatedly telling the Union representatives that it was unwilling to move off its ‘last, best, and final; offer of March 2015, without having remedied the conduct found unlawful in

the decision and recommended order described above in paragraph 5, subparagraph (b);

“Conditioning further bargaining on the Union making ‘sufficient; movement in its proposals, while refusing to move off its own proposals that were made at a time when Respondent was bargaining in bad faith;

“Since March 1, 2016, repeatedly threatening the Union that the parties were at impasse, and threatening the Union that Respondent intended to implement portions of its final offer, in spite of the fact that the parties had met one time since the unfair labor practice hearing described above in paragraph 5, subparagraph (a);

“Implementing portions of its March 15, 2015 ‘last, best, and final; offer at a time when the Respondent and the Union had not engaged in sufficient bargaining and had room for further movement on terms and conditions of employment;

“Undermining and disparaging the Union both at and away from the bargaining table, by the conduct listed above in paragraph 6;

“Failing and refusing to provide necessary health insurance cost information that was initially requested by the Union in April 2015, and that was found unlawful in the decision and recommended order described above in paragraph 5, subparagraph (b);

“Failing and refusing to implement longevity pay increases as required in the decision and recommended order described above in paragraph 5, subparagraph (b).

The Respondent denies this allegation.

The Nature of “Surface Bargaining”

Unlike the complaint in the case before Judge Steckler, the present complaint alleges that the Respondent has engaged in “surface bargaining,” a term the Board has defined as “employing the forms of collective bargaining without any intention of concluding an agreement.” *U.S. Ecology Corp.*, 331 NLRB 223 (2000). To determine whether an employer has engaged in surface bargaining, the Board looks to the totality of the Respondent’s conduct, both at and away from the bargaining table. *Hardesty Co.*, 336 NLRB 258 (2001).

A persistent, duplicitous and malignant bad faith drives surface bargaining. Such bad faith is persistent because surface bargaining takes place over a span of time, during which the offending party harbors a fixed intent not to reach agreement. It is duplicitous because it entails pretending sincere interest in reaching an agreement while secretly pursuing the opposite goal. It is malignant because it aims to subvert the very heart of the relationship between the employer and the exclusive bargaining representative.

Section 8(d) of the Act defines the duty to bargain as the obligation “to meet at reasonable times and confer in good faith” and, at the request of either party, to execute a written contract embodying the agreed-upon terms and conditions of employment. A party engaged in surface bargaining meets and confers but with the unspoken goal of reaching impasse rather than

agreement.

However, surface bargaining can be as difficult to distinguish from lawful “hard bargaining” as a coral snake from a king snake. The same Section 8(d) which defines the bargaining obligation also provides that the duty to bargain in good faith “does not compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. 158(d). Thus, a party’s unwillingness to give in, by itself, does not establish a lack of good faith.

It isn’t necessary for surface bargaining to begin at or before the start of negotiations. An employer may come to the first negotiating session with the intent to drive a hard bargain, but a bargain nonetheless. At some point later in the negotiations, the employer’s intent might change from aiming at a hard bargain to seeking no agreement at all. When the intent to frustrate rather than reach agreement takes over, unlawful surface bargaining begins.

The General Counsel has alleged such a theory of violation here. The complaint in the case before Judge Steckler did not allege surface bargaining, and the present complaint alleges that the Respondent has been engaging in surface bargaining “since about February 2016.” These two facts—that the General Counsel did not plead surface bargaining in the prior case and now only alleges that surface bargaining began in about February 2016—amount to a concession that the Respondent was not engaged in surface bargaining in 2015.

Complaint paragraph 18 lists a number of actions which, it alleges are ways that the Respondent engaged in surface bargaining. Some of these involve conduct which Judge Steckler found violative, for example, failing and refusing to provide health insurance cost information and failing and refusing to implement longevity pay. However, I do not understand the complaint to allege that these actions constituted surface bargaining in 2015. Rather, I understand the complaint to allege that these violations continue because the Respondent has not yet provided the requested information and has not yet implemented the longevity pay increases. Thus, the complaint effectively alleges that these alleged continuing violations became part of surface bargaining when the Respondent began engaging in surface bargaining in about February 2016.

Complaint paragraph 18 alleges that the Respondent engaged in surface bargaining by, among other things, refusing to bargain over wages “in spite of the fact that Respondent’s wage proposal was found unlawful in the decision and recommended order described above in paragraph 5, subparagraph (b).” However, the statement in quotes is not an accurate description of Judge Steckler’s decision.

Judge Steckler did not “find unlawful” the Respondent’s wage proposal. Neither the remedy nor the order portion of her decision requires the Respondent to rescind this proposal, as would be the case if the proposal were unlawful.

Bargaining proposals can be classified as mandatory, permissive, or prohibited, an “unlawful” proposal falling into this third, and rare, category. If one party proposed that the other party engage in criminal conduct, for example, that would be unlawful. The Board certainly could order a Respondent to withdraw an unlawful proposal.

A proposal concerning a permissive subject of bargaining,

such as what job classifications are included in the bargaining unit, may be raised and discussed but neither party may insist until impasse that the other side agree to it.

As the name implies, parties have a duty to bargain about mandatory subjects, such as wages and hours. However, as noted above, Section 8(d) of the Act, defining the duty to bargain collectively, provides that “such obligation does not compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. 158(d). Because of this proviso, I have some doubt about the extent of a judge’s authority to order a respondent to withdraw a proposal about a mandatory subject of bargaining. But, as already noted, Judge Steckler’s decision did not order the Respondent to withdraw the proposal or offer a new one in its place.

Judge Steckler’s decision also did not brand the Respondent’s wage proposal unlawful. To the contrary, it concerns a mandatory subject of bargaining.

Rather, as I understand her decision, she found that the Respondent had bargained in bad faith because it offered a confusing proposal and then failed to provide an explanation sufficient to clear up the confusion. Thus, when asked a question about the proposal, the Respondent provided pie charts purporting to show each employee’s compensation. However, Judge Steckler found that the pie charts themselves were confusing, and did not answer the question the Union had asked.

Additionally, the General Counsel’s brief seems to back away from the Complaint’s allegation that the proposal had been “found unlawful” by Judge Steckler. The brief seems to concede that there was nothing wrong with the substance of the wage proposal:

As found by ALJ Steckler, the issue with Respondent’s wage proposal is not one of substance—the unlawfulness of Respondent’s proposal rests on the fact that it is simply incomprehensible. In order to bargain in good faith, parties must, by necessity, present intelligible proposals.

In the abstract, that argument certainly is sound. If an employer handed the union a proposal written in ancient hieroglyphics, it might well raise a question about that employer’s intent.

However, the General Counsel bears the burden of proving that the union representatives did not understand the proposal. In the present case, the Government must establish that the Union did not understand the wage proposal when negotiations resumed in February 2016. The complaint alleges that the Respondent began surface bargaining in about February 2016.

A finding that the wage proposal was incomprehensible when the Respondent first offered it in 2015 does not warrant an assumption that it remained incomprehensible because even complex things become understood. If incomprehensibility were eternal, no one could ever learn calculus, or a foreign language, or the Internal Revenue Code.

The General Counsel’s Brief cites Union Official Goff’s testimony that he did not understand the proposal as of May 26, 2016, shortly after the Respondent implemented it. However, I do not credit this testimony.

The Respondent made its wage proposal on an Excel spreadsheet which showed the hourly rate of each employee and the

hourly rate each employee would receive during each year of the proposed contract. On cross-examination, Goff demonstrated that he fully understood the information on the spreadsheet.

At one point during Goff's testimony about the spreadsheet, counsel for the General Counsel objected, stating "the document speaks for itself here." That observation correctly described the spreadsheet. The entries were so clearly labeled and easy to understand that the spreadsheet needed no one to explain it.

Considering the clarity of the spreadsheet, I reject Goff's testimony that, in 2016, he and the other union negotiators did not understand the proposal which the spreadsheet conveyed. Confusion arose during the 2015 bargaining not because of the spreadsheet but because the Respondent prepared and gave to the Union pie charts purporting to show the total compensation for each employee, including expenses such as the cost of workers' compensation insurance.

The pie charts caused considerable confusion and distraction. Here, I do not second guess Judge Steckler's conclusions that the union negotiators were confused and that the Respondent bargained in bad faith. However, the question for me does not concern whether the wage proposal was confusing in 2015 but whether it was confusing in February 2016. The spreadsheet, not the pie charts, memorialized the Respondent's proposal and the meaning of this document speaks with crisp clarity.

In the portion of the General Counsel's Brief quoted above, the Government argued that to meet the standard of bargaining in good faith, a party must present intelligible proposals. The brief continues by arguing that the Board has authority to order an employer to change the form (but not the substance) of a proposal to clarify it:

Requiring Respondent to modify its wage proposal, such that it can be understood by the Union at the bargaining table, simply does not run afoul of the general proposition that the Board cannot force parties to make concessions. See, e.g., *Alwin Manufacturing Co.*, 326 NLRB 646, 648 (1998), [enfd.] 192 F.3d 133 (D.C. Cir. 1999) (Order prohibiting employer from maintaining proposals regarding production and changes in vacation policy that were found unlawful in previous decision).

In other words, the General Counsel claims that the form of the Respondent's proposal can be changed without affecting its substance. More than that, the government is arguing that the form *must* be changed to make the proposal lawful. Even more than that, the General Counsel asserts that the Board has the authority to order the Respondent to change the form of its proposal.

However, the General Counsel does not say what kind of change could be made in the format which would clarify the proposal without changing its substance. The Respondent's proposal, in spreadsheet form, shows the wage rate each employee would receive during each year of the proposed agreement, and does so clearly and succinctly. No better way to present this information is self-evident and the Government has not proposed one.

To summarize, the General Counsel's Brief states that the issue "is not one of substance." Rather, according to the government, the Respondent's proposal is so confusing that it constitutes evidence of bad faith, of an intent not to reach an

agreement. However, the General Counsel has not demonstrated how the proposal, in spreadsheet form, is confusing and has offered no example of a clearer alternative. Contrary to the General Counsel, I find that the proposal is clear. Therefore, I reject the argument that it constitutes evidence of bad faith.

Complaint paragraph 18 also alleges that the Respondent engaged in surface bargaining by, among other things, "Conditioning bargaining with the Union on the parties not discussing wages." The General Counsel's brief cites as examples the May 6, 2016 email from Respondent's lead negotiator Henry to Union President Goldman and the May 12, 2016 email from Dwyer to Goldman. Both are set forth above.

Henry's May 6, 2016 reply to a May 5 email which stated the Union's availability to meet on four specific dates. In response, Henry asked if the Union had any proposals to make.

At this point, the Respondent and Union already had gone through one unfair labor practice hearing and the Union and Goldman had warned that the Union would file further charges if the Respondent unilaterally implemented its wage proposal. In such circumstances, there would be a temptation to fill an email with self-serving statements and posturing.

Because neither Henry nor Goldman testified, the record provides no ready way either to verify or disprove some of the factual statements in the emails. So, I am a bit wary of two claims which Henry made in his May 6 email. The first involves an assertion that the Union had "not responded to our requests to meet for discussions."

The second claim continues an assertion which Henry had made in earlier emails, namely, that at one point Goldman had told him she had three ideas for resolving the issues in the negotiations. In his May 6 email, Henry complained that Goldman had never clearly identified those three ideas. Henry continued:

Mere willingness to meet is not enough to break Impasse. We are clearly at Impasse. The National Labor Relations Act does not require us to engage in a 'fruitless marathon' of negotiations. And so, I ask again: Does the Union have any proposals to make?

Nowhere in this email does Henry expressly state that the Respondent would not bargain with the Union unless it was going to make a new proposal. Moreover, I am reluctant to infer such a condition.

If, as Henry claimed, the Union had not responded to requests to meet, and if, as Henry also claimed, Goldman had three ideas for resolving the issues but never disclosed them, then Henry was merely expressing frustration when he asked if the Union had any proposals to make. In the absence of testimony by Henry and Goldman, these "ifs" linger. Therefore, I will not read into the email an implication that Henry really was saying "We won't meet unless the Union offers a new proposal."

Dwyer's May 12, 2016 email to Goldman does include an explicit statement that "we are not willing to meet related to the impasse issues we are implementing, unless you have a new proposal to make."

Clearly, if the Respondent had required the Union to agree to a proposal as a condition of meeting, such a precondition would be inconsistent with the duty to bargain in good faith and would violate the Act. *Carey Salt Co.*, 358 NLRB 1142 (2012).

However, the Respondent here did not require the Union to agree to anything as a condition of bargaining. It only required the Union to make a new proposal.

The Respondent was saying, in effect, “We’ve talked enough. We’re not going to waste time talking if there’s little chance that an agreement with result.” Henry’s May 6, 2016 email had said it more politely: “The National Labor Relations Act does not require us to engage in a fruitless marathon’ of negotiations . . .”

To describe 2 bargaining sessions in 4 months as a “marathon” suggests that the Respondent gets easily winded. Even including the 11 bargaining sessions in 2015, the negotiators met on average less than once a month. Moreover, an employer acts at its own peril when it unilaterally decides that negotiations have become a “fruitless marathon.”

The Respondent presumes that only a new proposal from the Union will allow further negotiations to be productive. That attempt to redefine and constrict the negotiating process suggests an intent to downsize its duty to bargain. Section 8(d) of the Act defines that duty broadly as the obligation “to meet at reasonable times and confer in good faith . . .” 19 U.S.C. § 158(d). Exchanging proposals is only one part of the duty to meet and confer.

Although the Respondent’s wage proposal, presented on a spreadsheet, is easy to understand, it has many moving parts. The spreadsheet shows the wage rate each individual employee would receive each year over the term of a 5-year contract. The Union has a duty to represent each of these workers fairly, so it has a compelling interest in making sure that each employee’s wage rate, when compared to the wage rates received by her fellow employees, is perceived as fair.

Stated another way, should the Union agree to a wage proposal which employees believe unfairly favors some over others, it would undermine the Union’s support among employees and make representing them more difficult. Therefore, the Union has a compelling interest in fully understanding why the Respondent proposed a particular wage rate for one employee but proposed a different rate for another similar employee.

The Respondent repeatedly has stated that this proposal is its final offer and that it will not budge. Presumably, if the Union made a counterproposal with a greater total cost, the Respondent would reject it. However, the Union might well make a counterproposal which did not increase the cost to the Respondent but allocated the money differently among the employees. As discussed above, it has a compelling interest in treating all employees fairly, and it might well decide that how the Respondent’s proposal allocated the money was not fair.

To reach a conclusion about the fairest way to allocate the money, and to embody that conclusion in a proposal, the Union would need to meet with the Respondent to discuss how and why the Respondent decided upon wage rates for each employee. Only after such discussions would the Union be prepared to submit a comprehensive counterproposal.

The Respondent decided to submit a wage proposal which treats each employee separately. Having done so, it may not deny the Union the opportunity to engage in the detailed discussions needed to formulate a counterproposal. To require the Union to submit a proposal as a precondition of engaging in discussion gets it exactly backwards.

In these circumstances, the Respondent’s refusal to discuss its wage proposal unless the Union first submitted a proposal constitutes a discrete instance of bargaining in bad faith, in violation of Section 8(a)(5), and is also evidence to consider in ascertaining the Respondent’s overall intent.

Complaint paragraph 18 also alleges that the Respondent engaged in surface bargaining by, among other things, repeatedly “telling the Union representatives that it was unwilling to move off its last, best, and final offer of March 2015, without having remedied the conduct found unlawful” in Judge Steckler’s decision.

Presumably, the words “unwilling to move off its ‘last, best, and final offer’” mean “unwilling to make a concession.” In the labor relations context, the phrase “move off of” certainly would carry that connotation. However, the Supreme Court has held that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements. *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

Considering a refusal to make a concession to be evidence of bad faith would be compelling a concession indirectly, which the Board may not do. It is true that the Board may take into account a Respondent’s failure to make any concession at all, or even a pattern of refusals to make concessions, when assessing an employer’s motive or good faith. But here, the Complaint seeks to infer bad faith from the Respondent’s refusal to make a concession on a specific proposal, its final offer. That would, I believe, be inconsistent with the Supreme Court’s holding in *American National Insurance Co.*

Moreover, for reasons discussed above, I have concluded that the Respondent did not violate the Act when it came to the bargaining table in February 2016 with the same wage proposal which had been examined by Judge Steckler. Her decision did not order the Respondent to withdraw or rewrite that proposal. By the time bargaining resumed in February 2016, the Union fully understood the proposal.

For these reasons, I will not consider the Respondent’s refusal to “move off of” its final offer as evidence of bad faith or surface bargaining.

Complaint paragraph 18 also alleges that the Respondent engaged in surface bargaining by, among other things, “Conditioning further bargaining on the Union making ‘sufficient’ movement in its proposals, while refusing to move off its own proposals that were made at a time when Respondent was bargaining in bad faith.” For reasons discussed above, I will ignore the words “while refusing to move off of its own proposals that were made at a time when Respondent was bargaining in bad faith.” The Supreme Court’s *American National Insurance Co.* decision makes problematic the words “while refusing to move off of its own proposals.”

However, those words are superfluous. The Respondent had presented the Union with a final offer that reasonably would

require extended discussion.¹⁰ Then, it sought to charge an admission price—a new proposal from the Union—before it would bargain. The law has imposed on the Respondent a duty to bargain with the Union. The Respondent may not lawfully exact a price for doing what the law requires.

Complaint paragraph 18 also alleges that the Respondent engaged in surface bargaining by, among other things, “repeatedly threatening the Union that the parties were at impasse, and threatening the Union that Respondent intended to implement portions of its final offer, in spite of the fact that the parties had met one time since the unfair labor practice hearing” before Judge Steckler. The General Counsel’s brief states:

Respondent’s premature threats of impasse further demonstrate its bad faith at the bargaining table. The Board has previously held that such threats can serve as evidence of bad faith. *Grosvenor Resort*, 336 NLRB 613, 615 (2001), [enfd.] 52 F. App’x 485 (11th Cir. 2002); *Regency Service Carts*, 345 NLRB 671, 673 (2005). For example, in *Grosvenor Resort*, the Board found that Respondent’s declaration of impasse, made at a time when the parties were still making movement at the bargaining table, “was indicative of bad faith.” 336 NLRB at 616.

The cited *Grosvenor Resort* and *Regency Service Carts* do not use the term “threatening impasse,” which I believe is confusing. The word “threat” indicates coercion to compel someone to do (or not do) something. However, the reason why a premature declaration of impasse reveals bad faith is its unseemly eagerness.¹¹ The surface bargainer anticipates impasse the way a child in the back seat anticipates the end of a long motor trip, repeatedly asking “are we there yet?” Only at impasse can the surface bargainer act unilaterally, and he can hardly wait to get there.

Complaint paragraph 18 does not specifically describe one action the Respondent took in its urgent push for impasse, but I believe this action reveals much about the Respondent’s true motivation. It offers such a revealing glimpse of the Respondent’s intent that it merits examination here even though it revisits matters already described above.

As the anticipated implementation date approached, the Respondent prevented the Union from bargaining by insisting that the Union make another proposal as a precondition of bargaining about wages. This precondition alone emanates a huge whiff of bad faith.

It bears repeating that the Respondent’s wage proposal could cause the Union more trouble than a box of snakes. Proposing separate wage rates for each individual employee—and the Respondent’s proposal listed more than 400 employees by name—was a surefire way to stir up trouble in the bargaining unit and sow seeds of hostility towards the Union. The employees less favorably treated would feel discriminated against and would blame the Union for agreeing to the proposal.

As the exclusive bargaining representative, the Union has a

duty of fair representation. Alleged breaches of this duty can lead either to an unfair labor practice proceeding before the Board or to a lawsuit in court. *Vaca v. Sipes*, 386 U.S. 171 (1967).

Union officials, well aware of this duty, would view the Respondent’s proposal with trepidation. How could they tell if the proposal discriminated against women or members of minority groups? Or employees over 40? Or employees with disabilities? How could they know whether some less favorably treated employees had engaged in protected concerted activities?

For that matter, how could union officials know that the Respondent wasn’t simply playing favorites? Employees typically expect a union to fight favoritism, not agree to it.

Finding answers to these questions would necessitate extensive discussions with Respondent. Only by meeting and conferring with the Respondent could the Union obtain reliable answers to these questions. Only then, after such careful discussions, would the Union be aware of problems needing correction. Only then could the Union present a counterproposal to correct the problems discovered.

Yet the Respondent insisted that the Union present its proposal *before* it would discuss the matter. That precondition prevented the Union from doing its job as the employees’ representative.

In deciding what this precondition reveals about the Respondent’s intent, I take into account that the Respondent was represented by attorneys with decades of negotiating experience. The senior partner at the law firm representing the Respondent had even written a book about collective bargaining in 1981.

Such expert counsel surely knew that the Respondent was giving the Union a proposal which, if agreed to, could cause the Union to lose the support of many employees and which even could lead to litigation against the Union. The Respondent’s counsel surely recognized that the Union would have to discuss the proposal at length with Respondent before being able to formulate an appropriate counterproposal. Therefore, I conclude that the Respondent’s insistence on a counterproposal before being willing to discuss the proposal clearly reveals an intent to bargain in bad faith.

Complaint paragraph 18 alleges other ways in which the Respondent engaged in surface bargaining. However, the most telling evidence of surface bargaining does not fit neatly into one of that paragraph’s listed categories. Still, the paragraph makes clear that the alleged surface bargaining extended beyond the listed examples to “other actions.” Here, therefore, I depart from the list to focus on other relevant conduct.

In considering this evidence, it helps to keep in mind the nature of surface bargaining and the *modus operandi* of the surface bargainer. The dark art of surface bargaining follows three guiding principles: (1) Have only as many bargaining sessions as necessary to create the appearance that the surface bargainer is acting in good faith. (2) Make those bargaining sessions as

representation. The Union thus needed to take care, and to discuss the Respondent’s proposal employee by employee. That takes time.

¹¹ A *threat* to declare impasse, if effective, would prompt the union to make a concession and thereby prolong negotiations. That’s not what the surface bargainer wants.

¹⁰ The Respondent’s proposal, which specified the wage rate for each individual employee for each year of the contract, almost certainly would cause some employees to believe they were being treated unfairly vis à vis their coworkers. They would blame the Union for agreeing to the proposal and might even charge the Union with breach of the duty of fair

unproductive as possible. (3) Blame the other side for being unreasonable and preventing agreement and create a “paper trail” documenting that the other side bore responsibility for the deadlock.

In the present case, just one bargaining session took place in 2016 before the Respondent announced it would implement its wage proposal. As discussed above, at one point 4 days before implementation, the Respondent told the Union it would not discuss its wage proposal any further unless the Union made a new proposal. This maneuver served both the first and third principles of surface bargaining. It limited the amount of bargaining and it set the stage to place the blame on the Union.

Stated another way, the third principle of surface bargaining involves “playing the victim” convincingly. The Respondent’s May 6, 2016 email to the Union provides a textbook example of how to do it. At some point in the bargaining, Union President Goldman apparently made a casual remark to the Respondent’s lead negotiator, Michael Henry. In frustration at the lack of progress, Goldman had said something to the effect that she had “three ideas” for reaching agreement, several times after that, Henry asked Goldman to disclose those ideas.

In Henry’s May 6, 2016 email to Goldman, he wrote: “despite my repeated requests, you have failed to clearly identify the three Ideas you said you had for reaching resolution. Mere willingness to meet is not enough to break Impasse.” Thus, the email subtly suggested a connection between impasse and Goldman’s supposed failure to tell Henry her “three ideas” for reaching agreement.

Having implied that Goldman’s supposed failure to “clearly identify” her “three ideas” contributed to the claimed impasse, the email hints that the Union’s conduct justifies a refusal to meet further: “We are clearly at Impasse. The National Labor Relations Act does not require us to engage in a ‘fruitless marathon’ of negotiations.”

The words “fruitless marathon” carry a bit of irony. Surface bargaining’s intermediate goal is to render negotiations fruitless while maintaining the appearance of earnest effort. Only then can the surface bargainer reach the ultimate goal of a fake but legitimate-looking impasse.

The Respondent’s negotiators demonstrated particular skill in applying the second principle of surface bargaining, making the bargaining sessions unproductive. In a May 5, 2016 email to Henry, Goldman complained about the Respondent’s negotiating practice:

The Employer has repeatedly after receiving [the Union’s] proposals, left the room and not returned for the remainder of day. Our proposals then are answered via email, with nothing but rejections.

This take-the-proposal-and-run retreat from face-to-face discussion could reflect an intent to avoid actual bargaining or,

arguably, it might merely result from the Respondent’s negotiators being painfully shy. However, in my experience, labor lawyers and labor negotiators are not painfully shy.

The technique of leaving and then rejecting the proposal by email had the disadvantage of making the bargaining sessions short. To create the appearance that the parties had bargained exhaustively, and therefore really were at impasse, the bargaining sessions needed to be plausibly long. The surface bargainer, therefore, looks for ways to put ice, not sand, under the wheels. The Respondent employed a remarkably effective way to engage in back-and-forth talking without accomplishing anything. Pie charts.

Pie charts would seem to be totally harmless and incapable of causing much harm, yet, in 2015, when the Respondent brought in its pie charts, that action threw a figurative smoke bomb into the negotiations. Billows of confusion clouded the issues and prompted much discussion which was time-consuming but unproductive. The pie charts, having little relevance to the terms of the contract being negotiated, proved to be a masterful distraction.

Describing the pie charts as a “masterful distraction” might seem an exaggeration because a pie chart, sitting there on the table, appears almost totally harmless. Therefore, it should be noted that the disruptive potential of the pie charts depends on how they are constructed and used, and on the skill of the negotiator who wields them. In the present case, if using pie charts were a martial art, the Respondent’s negotiators would be at the black belt level.

The senior partner in the law firm representing the Respondent testified at the hearing. Arch Stokes¹² described his extensive experience in negotiations and testified that, for many years, he has advocated using pie charts in bargaining. He included illustrations of pie charts in a 1981 book he wrote about bargaining in the hotel and restaurant industries.

Perhaps to dispel any notion that it was odd to use pie charts in labor negotiations, Stokes described how often he had done exactly that. He pointed out that pie charts were included in a collective-bargaining agreement which he had negotiated, on the Respondent’s behalf, with the same Union as in this case. That negotiation involved a separate bargaining unit of the Respondent’s “textile care” (laundry) employees¹³ and concluded successfully with a contract.

In negotiations with the Union regarding this other bargaining unit, Stokes had made sure that the contract included, as an attachment, some pie charts. However, when the Union had the collective-bargaining agreement printed in booklet form to distribute to shop stewards, it left the pie charts out. Stokes, who sounded a bit saddened by this exclusion, attributed it to the Union’s desire to save printing expense.

The omission of the pie charts from the printed contract did not make the document any less useful because the pie charts

¹² As Stokes testified, I observed his demeanor. He had the master negotiator’s gifts of poise, charm, and the ability to talk at length, even about the inconsequential or irrelevant. Although I credit his testimony as to facts, when uncontradicted, I note that sometimes he expressed opinion with the certitude of fact. For example, he testified that when the Respondent presented its “last, best and final offer” in March 2015, the union negotiators expressed confusion, but added “They understood

it. They just didn’t like it.” I will consider such testimony to express Stokes’ opinion rather than as a statement of objective fact.

¹³ The laundry employees work at a separate location from the Respondent’s hotels and under separate supervision. The employees previously had been included in the large bargaining unit which figures in this case but the Respondent filed a unit clarification petition resulting in the separate bargaining unit.

were irrelevant. They purported to show the total cost to the Respondent of an employee by adding in expenses not usually considered wages or benefits. For example, the pie chart included an amount representing the cost of workers' compensation insurance. However, such information did not help a shop steward or employee understand and apply the terms of the agreement.

The pie charts indeed added little if anything of value to the employees who would read and apply the contract. The charts did not provide any information helpful to understanding or applying the contract.

Similarly, in the bargaining relevant here, the pie charts did not add much if any information relevant to the terms being negotiated. As already noted, the Respondent could use the pie chart to illustrate that the wages and benefits under negotiation did not represent the total expense of keeping an employee on the payroll. But apart from making this point about the total expenses associated with each employee, the pie chart contributed nothing to the bargaining except confusion.

If the Respondent only had used the pie charts to illustrate a point, that the Respondent paid more for each employee hour worked than was apparent from the paycheck stub, they likely would not have caused much confusion. However, the Respondent touted the pie charts as useful for another purpose, namely, answering a union negotiator's question about the Respondent's wage proposal. The pie charts were so obviously ill-suited for this purpose I conclude that the Respondent's negotiators intended the harm the pie charts wrought.

As discussed above, the Respondent gave the Union a wage proposal in a form rarely, if ever, seen in collective-bargaining agreements. Instead of grouping employees into categories based on seniority or job function, the Respondent's proposal listed more than 400 employees by name and proposed for each the wage rate that employee would receive in each year of the contract.

Trying to discern patterns in this mass of data would be a daunting task, if possible at all. The Union negotiators therefore sought a simplification. They asked about "floor and ceiling wage rates." The Respondent said, in effect, "Your answer is in these pie charts." Judge Steckler's decision summarized the discussion as follows:

The first proposal was confusing—it did not identify by job, job longevity, but identified each individual and a proposed pay rate. For current employees, proposed Appendix A was not by property either. Richfield seized upon Goff's request for clarification of the "top and bottom" to present a more confusing answer—even more pie charts. Pie charts are not a floor and ceiling answer. Instead of clarifying or simplifying the response, Richfield heaped more pie charts upon the Union and further muddled the negotiating waters.

Judge Steckler and I reach the same conclusion even though we use different metaphors. Instead of stating that the Respondent "further muddled the negotiating waters,"¹ I would return to the smoke bomb analogy, above, and conclude that the

Respondent blew more smoke. But however described, the Respondent's conduct is not consistent with bargaining in good faith.

The Respondent created the pie charts and understood what information the pie charts contained. The Respondent certainly must have recognized that using the pie charts to answer the Union's request for clarification would be both disingenuous and detrimental.

Considering the expertise of the Respondent's negotiators, it seems highly unlikely that they would misunderstand what the Union was requesting, a concise explanation of the parameters of the Respondent's wage proposal. Likewise, there is no reason to conclude that Respondent's negotiators would believe that giving the Union more than 400 pie charts would provide the simple, succinct summary the Union sought.

The Respondent's negotiators were not amateurs but highly experienced professionals. Attorney Stokes had been advocating the use of pie charts for 3-1/2 decades, ever since he included such charts in his book on collective bargaining. From his extensive experience with pie charts, and from his role producing the pie charts used by the Respondent, he would have known that they did not provide the clarification requested by the Union. Yet, the Respondent proffered them away.¹⁴

The Union negotiators soon developed an antipathy to the pie charts, which they perceived as inaccurate and unfair. For example, some of the charts figured in funeral leave as part of an employee's total compensation even though the employee had not attended any funeral.

The errors in the pie charts focused the union negotiators' attention on them. The Respondent urged the Union to distribute the pie charts to employees and to have employees go over the charts, looking for errors which would be corrected. Urging the Union and employees to look for mistakes certainly created the appearance that the Respondent was being fair and acting in good faith, but all the time focused on the charts was time not devoted to the real issues to be resolved at the bargaining table.

This pie chart distraction thus served the second principle of surface bargaining by making the time spent in negotiations as unproductive as possible. The surface bargainer then can point to the total length of the negotiations and say, "After all this time, we still cannot reach agreement. We're definitely at impasse."

To summarize, in 2015, the Respondent gave the Union a wage proposal which, if agreed to, likely would have caused dissension among bargaining unit employees, would have caused many employees to become hostile to the Union, and which might well have resulted in unfair labor practice charges alleging that the Union had breached its duty of fair representation. It was also possible, although probably unlikely, that if the Union had agreed to the proposal, it might have resulted in a lawsuit against the Union.

Additionally, this unpalatable proposal was complicated. When the Union asked for clarification, the Respondent gave the Union pie charts which caused confusion rather than clarification. The Respondent's experienced negotiators knew, or

¹⁴ Stokes effectiveness in sowing confusion may be heightened by his amiable and disarming manner. However, based on my observations of Stokes while he testified, I conclude the cheerful, harmless and slightly

doddering character he played was a role, and one he likely had practiced for some time. Behind the persona was a mind so brilliant it could even weaponize a pie chart.

certainly should have known, that discussing the pie charts would take time away from negotiating a collective-bargaining agreement.

The Respondent's bargaining style also minimized the opportunity for productive, face-to-face discussion. Upon receiving a Union proposal, the Respondent's negotiators would save it for later discussion with management officials and then one of the Respondent's negotiators would notify the Union by email that it rejected the proposal.

After only one bargaining session in 2016, the Respondent announced that the parties were at impasse and that it intended to implement portions of its wage offer. When the Union requested bargaining, the Respondent refused to discuss the proposal it was about to implement unilaterally unless the Union first made a new counterproposal. Conditioning further discussion on the Union first submitting a new counterproposal deprived the Union of the opportunity to meet and confer with the Respondent and thereby obtain the information needed to draft a counterproposal.

Respondent then implemented portions of its proposal unilaterally. As proves true in many other surface bargaining cases, the employer's haste to implement provided the most telling clue. In early May, the Union had asked the Respondent to meet to discuss the proposal, but the Respondent denied the request by placing an onerous condition on it, the requirement that the Union first had to submit a new proposal.

If the Respondent had merely been engaged in "hard bargaining," characterized by a sincere intent to reach agreement, albeit on favorable terms, the Respondent would have granted the Union's request for a meeting. After all, the hard bargainer really wants a contract, and an agreement can be obtained only through bargaining. By conditioning a discussion on the Union meeting an unreasonable precondition, the Respondent revealed that it was not a hard bargainer wanting to reach agreement but a surface bargainer intent on preventing one.

In reaching these conclusions, I rely in part on the factual findings in Judge Steckler's decision. However, it is not necessary for me to rely on her legal conclusions, which Respondent has appealed, to find an intent to engage in surface bargaining.

The clue which reveals the Respondent's intent is what its negotiators actually did, not a later conclusion about the lawfulness of that conduct. The Respondent's actions fit the signature pattern of surface bargaining and make sense only if the Respondent intended to frustrate bargaining, declare impasse and implement its proposal unilaterally.

Accordingly, I conclude that the Respondent, since on or before February 2016, has engaged in surface bargaining with a fixed intent not to reach agreement. Further, I conclude that the Respondent thereby violated Section 8(a)(5) and (1) of the Act, as alleged in complaint paragraph 21.

Complaint Paragraph 19(a)

Complaint paragraph 19(a) alleges that about May 12, 2016, Respondent unilaterally, and without agreement of the Union, implemented portions of its March 24, 2015, "last, best, and final" offer. Answering, the Respondent stated:

Denied. The partial implementation referred to in this paragraph of the complaint took place on May 16, consistent with the notice provided by the company.

The evidence supports the admission in the Respondent's Answer. I find that the unilateral implantation took place on May 16, 2016.

Complaint Paragraph 19(b)

Complaint paragraph 19(b) alleges that about July 7, 2016, Respondent unilaterally, and without agreement of the Union, implemented other portions of its March 24, 2015 "last, best, and final; offer" as modified during bargaining on June 7, 2016. The Respondent answered:

Admitted that implementation was unilateral, as the parties, despite the company's good faith bargaining, were unable to reach agreement.

Based on the Respondent's admission, I find that on about July 7, 2016, it unilaterally, and without the Union's agreement, implemented other portions of its March 24, 2015 "last, best and final offer."

Complaint Paragraph 19(c)

Complaint paragraph 19(c) alleges that the provisions which the Respondent implemented, as described in complaint paragraphs 19(a) and (b), constituted mandatory subjects of bargaining. The Respondent's Answer does not address the issue raised in complaint paragraph 19(c) but instead admits that the implementation was unilateral.

However, the record establishes without contradiction that the provisions of the Respondent's "last, best and final offer" which the Respondent implemented on May 16, 2016 and on about July 7, 2016, related to wages, hours or other terms and conditions of employment and constituted mandatory subjects of bargaining. I so find.

Complaint Paragraph 19(d)

Complaint paragraph 19(d) alleges that the Respondent engaged in the unilateral implementations described in complaint paragraphs 19(a) and (b) without first bargaining with the Union in good faith. The Respondent denies this allegation.

For the reasons stated above in connection with complaint paragraph 18, I have concluded that since on or before February 2016, the Respondent has engaged in surface bargaining. That is, it went through the motions of bargaining while having a fixed intent not to reach agreement. Further, I have found that the Respondent took actions to undermine the bargaining process to prevent agreement from being reached. Thus, I have concluded that since on or before February 2016, the Respondent has not bargained in good faith with the Union. Moreover, it has not remedied this or other unfair labor practices found in this case and in Judge Steckler's earlier decision.

Accordingly, I conclude that the government has proven the allegation raised by Complaint paragraph 19(d).

Complaint Paragraph 19(e)

Complaint paragraph 19(e) alleges that the Respondent made the unilateral changes described in Complaint paragraphs 19(a) and 19(b) without providing the Union with health insurance cost information requested by the Union in April 2015.

This paragraph alludes to a violation found by Judge Steckler

and described in her decision. In March 2015, the Union had requested information pertaining to the cost of health insurance. On April 4, 2015, the Union again requested some information regarding health insurance costs. The Respondent furnished the Union with information that same day. However, the Union was not satisfied with the information because it pertained to both bargaining unit employees and to those outside the unit.

The Union then requested information concerning health insurance costs for employees in the bargaining unit but excluding those outside it. Judge Steckler found that the Respondent had never furnished the Union with this information and concluded that the Respondent thereby violated Section 8(a)(5).

The Respondent emphatically disputes Judge Steckler's finding and has appealed to the Board. The Respondent's Answer to this allegation states:

Denied. As the evidence showed in the first ALJ trial, the company provided the requested information. ALJ Steckler's recommended decision to the contrary is in error.

The General Counsel has urged that the doctrine of collateral estoppel applies, precluding me from making new findings and conclusions regarding the matters Judge Steckler decided. For reasons discussed below, I have concluded that collateral estoppel does not apply because Judge Steckler's decision is not a final decision.

Nonetheless, as a practical matter, I accept Judge Steckler's findings and conclusions and will neither revisit nor second-guess them. The Board vested in her the responsibility to decide these matters and I have neither the authority nor the desire to unsettle matters she decided almost a year ago.

Without doubt, the Board has authority to have one judge decide de novo some factual or legal issues already decided by another judge. That happens on those quite rare occasions when the Board decides to remand a case to a judge other than the one who initially heard it. However, in those unusual instances the Board issues an order specifying that the matter will be heard on remand by another judge. Absent such an explicit conferral of jurisdiction, a judge has no authority either to revisit or undo the holdings of another of the Board's judges.

The governing principle here concerns lack of authority rather than the doctrine of collateral estoppel but the sane outcome results. The Board has not yet ruled on the Respondent's appeal. Absent a holding on appeal which overturns a part of Judge Steckler's decision, all parts of that decision will be respected here.

Based on the holding in Judge Steckler's decision that the Respondent failed to furnish the Union with the requested information about health insurance and noting the absence of evidence indicating that the Respondent has provided this information, I find that it did not.

Therefore, I further conclude that the General Counsel has proven the allegation raised in complaint paragraph 19(e).

Complaint Paragraph 19(f)

Complaint paragraph 19(f) alleges that the Respondent made the unilateral changes described in complaint paragraphs 19(a) and (b) without first remedying the unfair labor practices alleged in the complaint and amended complaint and as found by Judge

Steckler. The Respondent answered as follows:

Denied. ALJ Steckler's recommended decision, related to the referenced unfair labor practices, is in error. Further, without waiving the preceding sentence, the company continued negotiations with the union following the time of the hearing held before ALJ Steckler.

For the reasons stated above, the holdings in Judge Steckler's decision, including the conclusions that the Respondent committed certain unfair labor practices, will be fully respected here. The present record does not indicate that the Respondent remedied any of the unfair labor practices found by Judge Steckler and I conclude it did not.

The Respondent's answer avers that it "continued negotiations with the union following the time of the hearing held before ALJ Steckler." However, the Respondent's assertion that it "continued negotiations" falls short of stating that the Respondent bargained in good faith. For reasons discussed above, I have concluded that its "continued negotiations" consisted of unlawful surface bargaining.

Therefore, I conclude that the government has proven the allegations raised by complaint paragraph 19(f).

Complaint Paragraph 19(g)

Complaint paragraph 19(g) alleges that Respondent made the unilateral changes described in Complaint paragraphs 19(a) and (b) without having exhausted the collective-bargaining process and without having reached a bona fide impasse in negotiations. The Respondent has denied this allegation.

Absent a valid impasse, the Respondent violated the Act by implementing portions of its final offer unilaterally. The burden of demonstrating the existence of impasse rests on the party claiming impasse, in this instance, the Respondent. *Ead Motors Eastern Air Devices, Inc.*, 346 NLRB 1060 (2006).

The Board has defined impasse as that point in the negotiations when the parties are warranted in assuming that further bargaining would be futile. *ACF Industries, LLC*, 347 NLRB 1040 (2006), citing *A.M.F. Bowling Co.*, 314 NLRB 969, 978 (1994), enf. denied 63 F.3d 1293 (4th Cir. 1995), citing *Pillowtex Corp.*, 241 NLRB 40, 46 (1979).

Stated another way, impasse occurs "after good-faith negotiations have exhausted the prospects of concluding an agreement." *ServiceNet, Inc.*, 340 NLRB 1245 (2003), citing *McAllister Bros., Inc.*, 312 NLRB 1121, 1122 (1993). Thus, in labor relations law, the concept of impasse is prescriptive rather than descriptive. It doesn't simply serve as a synonym for "unable to agree" but rather defines the conditions necessary for an employer lawfully to do an otherwise forbidden act, making a material, significant and substantial change in terms and conditions of employment without first obtaining the agreement of the exclusive bargaining representative.

In determining whether a good-faith impasse has been reached, the Board can consider whether "the purported impasse is reached in the context of serious unremedied unfair labor practices that affect the negotiations." *Great Southern Fire Protection, Inc.*, 325 NLRB 9 fn. 1 (1997). Not all unremedied unfair labor practices give rise to the conclusion that an impasse was not a valid one. Only those unfair labor practices that contributed

to the parties' inability to reach an agreement can preclude a finding of valid impasse. *Lafayette Grinding Corp.*, 337 NLRB 832 (2002).

The Respondent's brief makes a similar point. Citing *Dynatron/Bondo Corp.*, 333 NLRB 750 (2001), and *Alwin Mfg. Co.*, 326 NLRB 646, 688 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999), it notes that only serious, unremedied unfair labor practice that affect the negotiations will make the claimed impasse invalid. The Respondent's continuing denial that it committed the unfair labor practices found by Judge Steckler, and its appeal of her decision, do not preclude it from arguing, alternatively, that such unfair labor practices did not have a significant effect on the negotiations.

Were I to reach this issue, I would conclude that some of the unfair labor practices found by Judge Steckler did affect bargaining. Specifically, I find that Respondent's bad faith at the bargaining table, when it "further muddled the negotiating waters" with the confusing pie charts, did indeed make it more difficult for the parties to reach agreement. Indeed, I specifically find that the Respondent intended to undermine the bargaining process and prevent agreement.

However, I need not consider the effect of the unfair labor practices found by Judge Steckler because the General Counsel has alleged and proven that, from February 2016 on, the Respondent engaged in surface bargaining. The entire point of surface bargaining is to have an effect—a negative effect—on the negotiations. Only a totally inept negotiator could attempt to engage in surface bargaining and yet bungle the unfair labor practice so badly that the negotiations escaped unharmed; the bad faith was not so feckless here.

For reasons discussed above, I have found that since at least February 2016, the Respondent consistently has bargained with a fixed intent not to reach agreement. Indeed, to create the appearance of an impasse which would allow it to impose its terms unilaterally, the Respondent refused even to discuss its wage proposal with the Union unless the Union first made a proposal. Yet the Respondent's proposal was so complex, and had so many possible ramifications, the Union could hardly make a meaningful counterproposal without first having the discussions which the Respondent refused.

The Respondent makes some assertions in its brief which need to be discussed. It disagrees with Judge Steckler's description of its wage proposal and denies that the proposal stymied the negotiations:

It cannot be stated or held that the making of this offer in any way tainted or barred the impasse and implementation.

Nothing in the Act, to my knowledge, prevents an employer from making a wage proposal which lists more than 400 bargaining unit employees individually along with the wage rates each employee would receive during each year of the contract. However, such a proposal places a union in a very awkward position because it represents all employees in the bargaining unit and should not play favorites. To assure that such a proposal treats all similarly situated employees equally, and that it doesn't discriminate invidiously against any protected class, the Union must engage in extensive discussions with the Respondent.

When an employer makes a proposal which foreseeably

requires greater than usual bargaining, its willingness to engage in such marathon discussions indicates good faith. A lack of such willingness indicates the opposite.

Likewise, when an employer tenders to the Union a foreseeably complex proposal, the efforts it makes to help the Union negotiators understand the proposal provide an indication of the Respondent's good or bad faith. Instead of helping the union negotiators to understand its wage proposal, the Respondent confused them, and wasted negotiating time, by giving the Union pie charts containing information irrelevant to the Union's inquiry. Based upon my examination of the Respondent's actions and my observations of the witnesses, I conclude that the Respondent did so deliberately, intending to frustrate the bargaining process.

The Respondent attempts to characterize the failure to reach agreement as simply a disagreement over the bottom line figure, over how much money the Respondent was willing to pay for wages and benefits. The Respondent also argues that the agreement it reached with the same Union concerning a separate bargaining unit of employees demonstrates that it was acting in good faith. The Respondent's Brief states:

Further, the "deadlock" that resulted was due directly, and overwhelmingly, to the Union's unwillingness to agree to the Company's wage proposal—particularly with respect to banquet compensation. Plain evidence of this lies in the fact that these same two parties were able to reach agreement in the Textile Care Services bargaining. The Agreement reached there did not have the same roadblock—a major change in compensation—as was at issue in the hotels-unit bargaining.

However, it cannot simply be assumed that because someone acted lawfully in one instance it would always act lawfully. Additionally, from the present record it would be difficult to determine whether the Respondent engaged in the same confusion-causing tactics during bargaining with the Union concerning the other unit. The record only proves that the Respondent used confusion-producing tactics in the present case. That is enough.

The Respondent argues that the parties simply deadlocked because it wanted economic concessions, including substantially lower wage rates for the banquet employees. According to the Respondent, the Union could not bring itself to make such a concession. The Respondent's brief states:

Here, after telling the Union in 2014 that it needed labor-cost relief, and after bargaining in good faith over eight sessions in 2015—again, there was no surface-bargaining allegation—the Company was within its rights to stand firm, provided it gave the Union a reasonable opportunity to negotiate.

The problem with this argument is simply that the Respondent did not give the Union reasonable opportunity to negotiate. Quite the opposite. It refused to discuss the wage issue further unless the Union made a concession. Its haste to implement its proposal unilaterally caused it to take a shortcut, refusing to discuss the issue and proceeding to unilateral implementation unless the Union immediately offered another proposal.

Any employer truly wishing to reach agreement would have taken time to meet and confer with the Union. However, an employer following a scheme to thwart bargaining and implement unilaterally on a certain date will not let an opportunity to meet—

and perhaps make progress towards agreement—interfere with his timetable. Neither perdition nor flood, let alone the legal duty to bargain in good faith, will nudge the surface bargainer off his schedule. He already has made up his mind.

After claiming to have given the Union a reasonable opportunity to bargain, the Respondent’s brief continues:

... as is well established in Board law, as stated by the Supreme Court, that an employer is not obligated, to engage in fruitless marathon discussions at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.

NLRB v American National Insurance, 343 U.S. 395, 404 (1952).

The Respondent’s argument that it is not required to engage in fruitless bargaining ignores a long-established principle: The law does not allow a wrongdoer to reap the benefit of his own wrongdoing. Someone who burns down his house does not get to collect the insurance money, and a company that sets out to make bargaining unproductive cannot credibly say, “I won’t go back, they never get anything done.”

With respect to the Respondent’s reference to the limits of the Board’s authority to judge the substance of proposals, no proposal of the Respondent is on trial here. This case is about Respondent’s intent as revealed by its negotiators’ conduct. Seeing in their behavior the constellation of actions characteristic of surface bargaining, and finding no other credible explanation for such conduct in the record, I have concluded that at least since February 2016, the Respondent has bargained with a fixed intent not to reach agreement.

According, I further find that the Respondent, unilaterally and without the Union’s consent, implemented its proposals, as described in complaint paragraphs 19(a) and (b), at a time when no valid impasse existed. Further, I conclude that the Respondent thereby violated Section 8(a)(5) and (1) of the Act, as alleged in complaint paragraph 21.

Collateral Estoppel

As discussed above, this is the second case focusing on the Respondent’s bargaining with the Union. The first case concerned allegations that the Respondent had committed unfair labor practices in 2015. Judge Steckler conducted the hearing in that case in December 2015 and issued a decision on May 27, 2016.¹⁶¹⁵

The present complaint alleges that the Respondent committed unfair labor practices in 2016, including implementing parts of its wage proposal without the Union’s agreement, at a time when the existence of unremedied prior unfair labor practices prevented a valid impasse. Judge Steckler had found that the Respondent had committed certain unfair labor practices in 2015 and the General Counsel wants to use those findings in this case to establish that unremedied unfair labor practices prevented a valid impasse.

To that end, the General Counsel has made reference to Judge Steckler’s findings in the present Complaint. The General Counsel also seeks to invoke the doctrine of collateral estoppel to preclude relitigation of the issues decided by Judge Steckler.

However, the precise legal definition of collateral estoppel makes issue preclusion inappropriate here. The doctrine provides that when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. *NLRB v. Yellow Freight Systems, Inc.*, 930 F.2d 316 (3d Cir. 1991), citing the Restatement (Second) of Judgments Sec. 2 (1982).

At this point, however, Judge Steckler’s decision is not final. It is pending, on appeal, before the Board. Accordingly, I conclude that it does not now qualify as a “final judgment” within the meaning of the collateral estoppel doctrine.

Although, technically, the doctrine of collateral estoppel does not apply, for the reasons discussed above in connection with Complaint paragraph 19(e), I will not relitigate the issues decided by Judge Steckler. The most fundamental reason is simply that the Board has not authorized me to consider de novo the evidence before her and reach independent conclusions. Had the Board wanted me to take such an extraordinary action, it would have said so specifically, in an order authorizing me to proceed. It has not done so.

Additionally, I would not presume to second guess Judge Steckler’s decision because she observed the witnesses as they testified about matters relevant to that case. Not all witnesses who testified before Judge Steckler gave testimony in the present case. Only Judge Steckler heard all the testimony relevant to that case. Accordingly, I rely fully on Judge Steckler’s findings and conclusions.

Summary of Findings

The following table summarizes the unfair labor practice findings and conclusions discussed above:

Complaint Paragraph	Allegation	Finding
6(a)	8(a)(1) threat	No merit
6(b)	8(a)(1) threat	No merit
6(c)	8(a)(1) threat	Merit
18	8(a)(5)surface bargaining	Merit
19(a)	8(a)(5)unilateral change	Merit
19(b)	8(a)(5)unilateral change	Merit

REMEDY

Having found that the Respondent violated the Act, I recommend that the Board order the Respondent to remedy these violations fully. The remedy includes posting the notice to employees attached hereto as Appendix.

The Respondent unlawfully implemented portions of its final

¹⁵ *Richfield Hospitality, Inc. As Managing Agent For Kahler Hotels, LLC*, Case 18–CA–151245 (JD-45-16).

proposal, changing the wage rates for bargaining unit employees. In many instances, these changes reduced an employee's compensation. Respondent must make the affected employees whole, with interest, for all losses they suffered because of the Respondent's unlawful action.

In the complaint, the General Counsel sought a remedy in addition to those routinely ordered. The complaint stated:

WHEREFORE, as part of the remedy for the unfair labor practices alleged above, the General Counsel seeks an Order requiring that Respondent's Area Managing Director Bill Dwyer read the notice to employees at meetings attended by employees on employee work time, with the meetings scheduled to ensure the widest possible attendance across all four hotel properties, shifts, and departments to the employees, in the presence of Respondent's supervisors and agents identified above in paragraph 4 who are still in Respondent's employ at the time of the reading. Alternatively, the General Counsel seeks an order requiring that Respondent promptly have a Board agent read the notice to employees employed in the bargaining unit during the employees' work time, in the presence of Respondent's supervisors and agents identified above in Paragraph 4 who are still in Respondent's employ at the time of the reading, at meetings scheduled to ensure the widest possible attendance across all four hotel properties, shifts, and departments.

In agreement with the General Counsel, I believe that the customary notice posting would not be sufficient to remedy the violations found herein. The Respondent had acquired the hotels at which the bargaining unit employees work during the term of the Union's collective-bargaining agreement with the predecessor employer. The Respondent assumed that contract. However, the violations found in this case and those found by Judge Steckler in the earlier case took place as the Respondent and the Union bargained for the first time for a full new agreement.

The Respondent's unfair labor practices thus come essentially at the start of the Respondent's long-term relationship with the bargaining unit employees and their Union. First impressions tend to be lasting impressions. The employees have seen the Respondent unilaterally change their compensation and otherwise demonstrate little respect for either their Union or the law itself. The intimidating effect of this conduct cannot be dispelled simply by posting a notice alongside various other notices required by government agencies.

Ordering the notice to be read aloud by one of Respondent's managers, or alternatively having the notice read by a Board agent in the presence of Respondent's management, would assure that the employees are aware that the law protects them when they exercise rights under Section 7 of the Act.

Surface bargaining is a particularly egregious violation because the surface bargainer is trying to subvert the system of collective bargaining which Congress enacted. It likewise is an attempt to avoid the duty to bargain in good faith which the Act imposes. Moreover, the surface bargainer attempts to achieve these ends by deception, pretending to be trying to reach agreement while actually doing the opposite. The Respondent must notify the employees clearly that from now on it will obey the law and that it will remedy any harm resulting from its unlawful acts.

In the Complaint language quoted above, the General Counsel sought an order requiring Manager Dwyer to read the notice. However, I infer from Attorney Stokes' testimony that Dwyer no longer is employed by the Respondent. Having the notice read by a manager of equal rank, or by a Board agent in the presence of such a manager, should suffice.

With respect to the meetings at which the notice is read to employees, the General Counsel seeks an order requiring these meetings to be scheduled at the times when most employees can attend. Although I agree that the meetings should be scheduled so as to maximize the opportunity for employees to attend, I do not believe that alone will suffice. Almost invariably, some employees will be unable to attend the meeting because of sickness, vacation or to attend to some other duty such as a school conference or court date.

Accordingly, to assure that employees will be able to hear the notice being read, I recommend that the Board order the Respondent to permit the Union to bring a camcorder to the meeting and record the notice being read. The Union then could assure that employees not present at the meeting could view the recording by distributing copies of the recording to Union officers and shop stewards and/or by posting the recording on a video sharing website such as YouTube.

This remedy imposes no additional cost on the Respondent. The Union would bear the expense of recording, and only if it chose to make such a recording.

The General Counsel, in an amendment to the Complaint, requested a further remedy. The General Counsel seeks an order requiring Respondent to pay to the Union all of its bargaining expenses during the period of time from February 25, 2016 until such time as Respondent begins bargaining in good faith, upon submission by the Union of a verified statement of costs and expenses.

In *Visiting Nurse Services of Western Massachusetts, Inc.*, 325 NLRB 1125 (1998), the Board stated that an order requiring a respondent to reimburse a charging party for negotiation expenses will be warranted in cases of unusually aggravated misconduct, where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of the bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies. In that case, which did not involve an allegation of surface bargaining, the Board denied the requested reimbursement remedy, stating:

The record fails to establish that an award of negotiating costs to the Union is warranted. The record does not show that the Respondent has engaged in flagrant, egregious, deliberate, pervasive bad-faith conduct aimed at frustrating the bargaining process or causing the Union to waste its resources in a futile effort to bargain for an agreement that the Respondent never intended to reach. Nor does the record show that the bargaining between the parties was merely a charade.

However, in the present case, the Respondent did engage in surface bargaining. It did engage in "conduct aimed at frustrating the bargaining process" and did cause the Union to waste its resources in a futile effort to bargain. In these circumstances, I believe that the reimbursement order sought by the General Counsel is warranted and recommend that the Board impose it.

CONCLUSIONS OF LAW

1. The Respondent, Richfield Hospitality, Inc., as managing agent For Kahler Hotels, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, UNITE HERE International Union Local 21, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Charging Party has been and is the exclusive bargaining representative, pursuant to Section 9(a) of the Act, of the following unit of the Respondent's employees, which constitutes an appropriate bargaining unit within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed in the job classifications and at the hotels listed in Appendix A of the most recent collective-bargaining agreement, which is effective by its terms from October 1, 2011 through August 31, 2014, between the Union and Sunstone Hotel Properties, Inc., as agent for The Kahler Grand Hotel, Rochester Marriott Mayo Clinic Area Hotel, and Kahler Inn & Suites; and all full-time and regular part-time employees employed in the job classifications listed in the Memorandum of Agreement, which is effective beginning on May 4, 2012, between the Union and Sunstone Hotel Properties, Inc., as agent for Residence Inn Rochester Mayo Clinic Hotel; excluding all other employees, guards and supervisors as defined in the Act.

4. At all material times, the Respondent has recognized the Charging Party as the exclusive bargaining representative of the employees in the unit described in paragraph 3, above.

5. Respondent violated Section 8(a)(1) of the Act by threatening employees that union representation was futile.

6. Respondent violated Section 8(a)(1) and (5) of the Act by the following conduct: (1) engaging in surface bargaining by endeavoring to create the impression of bargaining in good faith, while having a fixed intent not to reach agreement and while taking various actions to avoid reaching agreement. (2) unilaterally implementing portions of its wage proposal, over the Charging Party's objection and without the Charging Party's consent, at a time when no valid impasse existed.

7. Respondent did not violate the Act in any other manner alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended¹⁶

ORDER

The Respondent, Richfield Hospitality, Inc., as managing agent For Kahler Hotels, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Threatening employees that Union representation is futile.
 - (b) Engaging in surface bargaining by endeavoring to create

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

the appearance of bargaining in good faith while taking actions to thwart the bargaining process and avoid reaching agreement.

(c) Unilaterally changing compensation or making any other material, substantial and significant change in wages, hours or other terms or conditions of employment of any employee in the bargaining unit represented by the Charging Party, without first notifying and bargaining with the Charging Party concerning the proposed change and its effects. and without first obtaining the Charging Party's agreement, except when the parties have engaged in bargaining and reached a lawful and valid impasse.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral changes in compensation of bargaining unit employees, described in paragraphs 19(a) and (b) of the complaint, and, for each employee whose wage rate decreased because of the changes, restore that employee's wage rate as it existed before the changes.

(b) For all bargaining unit employees whose wage rates or compensation were reduced by the changes described in paragraphs 19(a) and 19(b) of the complaint, make those employees whole, with interest, for all losses suffered because of the unlawful changes. The make-whole relief shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(c) The Respondent shall compensate the Charging Party for all bargaining expenses the Union has incurred or will incur during a period beginning February 25, 2016 and continuing until the Respondent begins bargaining in good faith. Upon receipt of a verified statement of costs and expenses from the Charging Party, the Respondent promptly shall submit a reimbursement payment, in the amount of those costs and expenses, to the compliance officer for Region 18 of the National Labor Relations Board, who will document receipt and forward the payment to the Charging Party.

(d) Within 14 days after service by the Region, post at its facilities in Rochester, Minnesota, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places

¹⁷ If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD shall read POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, noticed shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 25, 2016. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(e) In addition to posting the notices in the manner described above in paragraph 2(q), the Respondent shall schedule employee meetings at each of its Rochester, Minnesota facilities at which bargaining unit employees work. These meetings shall be during the working time of the bargaining unit employees and the Respondent shall compensate them at their regular rate for the time spent attending. At each such meeting, one of the Respondent's management officials holding the rank of area managing director or higher shall read aloud the Notice to Employees attached hereto as Appendix A. Alternatively, at the Respondent's option, an agent of the National Labor Relations Board shall read the Notice while a management official holding the rank of area managing director or higher is present. The Respondent shall arrange for all supervisors normally on duty at the facility at that time to be present at the meeting. The Respondent also shall permit representatives of the Charging Party to attend each such meeting and, with camcorder or other audio-visual device, record the reading of the notice.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 4, 2017.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT threaten employees by telling them that Union representation is futile.

WE WILL NOT engage in surface bargaining by creating the appearance we are bargaining in good faith while taking actions to prevent reaching agreement.

WE WILL NOT change employees' wage rates or other terms and conditions of employment without first notifying the Union and affording it opportunity to bargain over the decision and its effects and WE WILL NOT implement such change unless the Union agrees or unless the parties bargain in good faith until reaching a valid impasse.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL bargain in good faith with the Union, UNITE HERE International Union Local 21, the exclusive representative of our bargaining unit employees.

WE WILL restore all employees adversely affected by our unlawful unilateral changes to the wage rates they previously enjoyed.

WE WILL make all employees adversely affected by our unlawful unilateral changes whole, with interest, for all losses they suffered because of those unlawful changes.

RICHFIELD HOSPITALITY, INC. AS MANAGING
AGENT FOR KAHLER HOTELS, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-176369 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

